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THE INDIAN COMPANIES ACT

Act No. VII of 1913.

(As amended by Act XXII of 1936 and Act II of 1938)

BY

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FOREWORD

The authors deserve congratulations for placing such a handy book on the market on such a difficult branch of law.

Legislation dealing with joint stock companies even in India has grown up like a living organism. To meet the necessities of the growing complexities of the economic and business life of modern times recourse was had from time to time either to a new enactment repealing a former one or substantial amendments to the already existing Act.

The Indian Companies Act of 1913 which held the field for a considerable time — subject to certain amendments — has been amended substantially by the recent Amendment Act of 1937, which seeks to introduce about a hundred new sections in the Act.

The sections newly inserted cover a wide field and introduce a number of important provisions dealing with joint stock companies. Many of the sections so inserted deal with the nature and conditions of managing agency, and the appointment, duties, liabilities, powers and rights of Managing Agents. A few sections contain provisions for effecting amalgamation and reconstruction of a company both as a going concern as well as in the course of winding up. Another group of new sections deals with the companies estab-

lished outside British India and a still further group deals with banking companies.

The authors have commented on the Act section by section. The subject though highly complicated has been treated by the authors in a very lucid manner. The comments contain a concise statement of leading principles as laid down in English and Indian decisions. Important topics such as the duties, powers and liabilities of Directors, Secretaries, Auditors and other responsible officers of the Company have been dealt with clearly so that those interested may find them without difficulty.

The book though primarily meant for the students, will also be useful for rough and ready use by legal practitioners, businessmen, company managers and all those who have anything to do with the management of companies or the administration of the Company Law. The exhaustive index enhances the value of the book.

K. M. Munshi.

High Court, Bombay,
1st June, 1940.

PREFACE.

The Indian Companies Act of 1913 which has been the law governing the incorporation, working and winding up of the Joint Stock Companies in India was found in actual working to be defective in certain vital matters concerning the Indian Joint Stock Companies. To remedy these defects, the Amendment Act of 1936 was enacted.

About a hundred new sections have been added covering a wide field of alterations and amendments. One group of newly inserted sections lays down the rules governing the managing agency contract thus recognising the important principle that a managing agency contract is not merely a private affair affecting the parties thereto, but is a matter of vital importance to the public whose interests the State is bound to protect.

Another salient feature of the Amendment Act of 1936, is the enactment of a separate chapter on Banking Companies; but it seems the interests of Indian Banking would have been better served if a separate Act had been passed as has been done in the case of Insurance Companies.

The scheme of the book is to comment on the Act section by section, citing both English and Indian decisions, setting forth the principles of the Indian Companies Act. The cases cited are upto April 1940. Scrupulous care has been taken to see that the principles of law set forth in the book are correct and the authorities cited as supporting them are appropriate. The Indian Companies Act being modelled on the English Companies Act, the importance of the English case law in interpreting and explaining the difficult sections of the Indian Companies Act can be well appreciated.

The object of the authors in bringing out this book is to help the students preparing for examinations, as well as to

provide the legal profession and the business world concerned with Joint Stock Companies, with a handy reference work. The authors feel that if the book is found useful by those for whom it is meant, their labour will have been amply rewarded.

The authors beg to express their deep obligation to K. M. Munshi, Esq., Advocate (O.S.) M.L.A., formerly Home Minister, Government of Bombay, for having kindly consented to contribute a foreward to this volume. The authors' thanks are also due to M. C. Chagla, Esq., Bar-at-Law, for valuable suggestions made during the course of the preparation of this work.

James Menezes.

H. V. Shah.

High Court, Bombay.

15th June 1940.

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THE INDIAN COMPANIES ACT,

ACT No. VII OF 1913.

(As amended by Act XXII of 1936 and Act II of 1938)

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

WHEREAS it is expedient to consolidate and amend the law relating to Trading Companies and other Associations; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

This Act may be called the
Indian Companies Act, 1913.
extent.

(2) It shall come into force on the first day of April 1914; and

(3) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

History of the Act:—The first piece of legislation with respect to companies passed by the Indian Legislature was the Joint Stock Companies Act of 1850 (Act No. XLIII of 1850). It was modelled on the English Companies Act of 1844. It provided for the incorporation of all unincorporated companies including those formed for scientific, literary and charitable purposes. The Act however, did not limit the liability of the shareholders, but only laid down machinery for the winding up.

The Act of 1850 was followed by Act XIX of 1857. The salient feature of this Act was that it limited the liability of the shareholders of incorporated companies, other than doing business in insurance and banking.

- S. 1.** Act was Act VII of 1860 which extended the limited liability principle to Insurance Companies and Banking Corporations.

Next in date was the Indian Companies Act of 1866 which was a consolidating statute, repealing all the previous enactments. The Act laid down provisions for the incorporation, regulation and winding up of trading and non-trading companies. The Act of 1866 was later replaced by the companies Consolidation Act of 1882, and was made uniform, as far as possible, with the then prevailing English Companies Act of 1877. This Act was then supplemented by the Memorandum of Association Act XII of 1895 and the Companies Branch Register Act IV of 1900, and was further amended by Act IV of 1910.

In the year 1913 Act VII of 1913 was passed being a consolidating Act and modelled on the English Companies Consolidation Act VIII of 1908. This Act was again amended by Act XXII of 1936 and finally by the Act No. II of 1938 passed on the 28th of February 1938.

Preamble:—As the preamble indicates, the present Act is an amending as well as a consolidating Act. The object of a consolidating and amending Act is to present the whole body of the statutory law on the subject in a complete form repealing all former statutes, in order that it may form a useful code applicable to the circumstances existing at the time when the Consolidation Act is passed.

The principle^(a) of interpretation of a Codifying Act is laid down by Lord Herschell. "In construing an Act (codifying) the proper course is in the first instance to examine the language of the Act uninfluenced by any consideration as to the previous state of the law, and not to start with inquiring as to how the law stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with that view". The same principle applies to an amending

(a) Bank of England V. Vagliano Bros. (1891) A.C. 107 at pp. 120 and 144; Advocate-General V. Premal (1895) 22.I.A. 107;

Thames Conservators V. Smead Dean & Co. Ltd. (1897) 2 Q.B.334 at

and consolidating Act, but in a less stringent degree. Speaking **S. 1.** generally, the enactments must be dealt with as they now stand, and that a minute critical examination of repealed clauses ought not to be entered upon for the purpose of interpretation, except on special grounds. Marginal notes to a section do not form part of the Act, and cannot be considered in construing its provisions^(b). Similarly it is not permissible to the Court to refer to the proceedings of the Legislature for the purpose of construing the provisions of the Act^(c). Illustrations to a section, although no part of the section, are helpful in showing the application of the Act, but they cannot be allowed to control the meaning of the section, when the meaning is plain enough^(d). Where the words of the Indian and English Act are indetical, the English decisions may operate as useful guides on any particular enactment^(e). The headlines to a section are intended to operate as a preamble to that section, to catch the eye at a glance, and may therefore be looked at for the purpose of construing the sections, to which they refer^(f).

Amendment Act of 1936:—This Act introduced large changes in the law as it stood before the amendment. A number of new sections have been added and several sections have been wholly repealed. Numerous and important alterations have been made in the existing sections. To consider how far the provisions of and the decisions under the older law would afford any guidance for the interpretation of the amended Act, is useful. Where an Act of Parliament has received a judicial construction putting a certain meaning on its words and the legislature in a subsequent Act, in *pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before. And unless there is something to rebut that

(b) Balraj Kumar V. Jagat Singh (1904) 31 I.A.132; Punardeo V. Ramsarup (1898) 25 Cal. 858.

(c) Krishna V. Naba (1920) 47 I.A. 33 at p.36.

(d) Mahomed V. Yeoh (1916) 43 I.A. 256; Mulraj V. Vishwanath (1913) 40 I.A.24,30.

(e) Thakur Ganesh V. Thakur Harihar (1910) 37 I.A. 116 at 120; Mackintosh V. Dunn (1907) 12 Cal. W.N. 1053, 1059.

(f) Dwarkanath V. Tafazan (1917)44 Cal. 267; Fletcher Vs. Birkenhead Corporation (1907)1 K.B. 205.

S. 2. presumption, the Act should be construed in the same way even if the words were such that they might originally have been construed otherwise^(g). The application of a decision may however, be excluded by a change in the language of the new Act^(h).

Object of the Act:—The object of the Act is to promote the formation of incorporated companies with limited liability. The Act embodies within itself a complete and exhaustive Code of rules for the formation, working and winding up of limited liability companies. By providing a simple and cheap machinery for converting an unlimited liability company into a limited liability company, the Act achieves a twofold purpose, firstly, the promotion and growth of big enterprises needing vast capital, and secondly, limiting liability and avoiding further personal liability.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(1) "articles" means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in the Table B in the Schedule annexed to Act No. XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act:

(2) "company" means a company formed and registered under this Act or an existing company:

(3) "the Court" means the Court having jurisdiction under this Act:

(4) "debenture" includes debenture stock:

(g) *Mersey Docks V. Cameron Jones* (1864) 11 H.L.Cs. 443 at p.480.

(h) *Thomas V. United Butter Co.* (1909)2 Ch.484.

- (5) "director" includes any person occupying S. 2. the position of a director by whatever name called:
- (6) "District Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction:
- (7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882;
- (8) "Insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses:
- (9) "manager" means a person who subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not:
- (9A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called:

Explanation. — If a person occupying the position of a managing agent calls himself a

S. 2. manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act.

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act:

(11) "officer" includes any director, managing agent, manager or secretary but, save in sections 235, 236, and 237, does not include an auditor:

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the Governor-General in Council:

(13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares, if any; and

(b) limits the number of its members to fifty not including persons who are in the employment of the company; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company:

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member:

(13A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882 or under the Indian Companies Act, 1866, or

under any Act, repealed thereby, which S. 2.
is not a private company:

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company, but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed:

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies: and

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied.

(2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company, or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint

S. 2. the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression 'subsidiary company' in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company:

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.

Amendments:—This section has been amended by the Amendment Act of 1936, the chief amendments being by way of introducing the definitions of the words "Managing Agent," "Public Company" and "Subsidiary Company."

Articles:—The memorandum of association is the charter of the company, the conditions on which alone a company is allowed to be incorporated. Within that area the company may make regulations for its internal government in such manner as it deems fit⁽¹⁾. The articles of association are in other words, the company's by-laws for the management of the internal affairs of the company and the conduct of its business.

Company:—The word "Company" includes both a public and a private company. No doubt, in the working of the Act all companies are governed by its provisions, but in certain matters a private company is exempted from the compliance with the provisions of certain sections viz: secs. 17(2), 54A (2), 77, 79 (1), 83A, 83B, 84, 86D, 86H, 87A, 87C, 87D, 87I, 91B, 91D, 98, 101 (7), 103, 131 (3), 134 (3), 141 (1) & (5) iii & 146.

(1) *Ashbury Railway Carriage & Iron Coy. V. Riche* (1875) 7 H.L.C. 653 at 667.

Director:—He is an officer of the company. The company itself cannot act in its person, for it has no person^(j). It must act by agents, and those persons through whom it acts and by whom its business is carried on are called its directors. The term includes a *de facto* director, who would also be liable for any act of commission or omission on his part in the same manner and to the same extent as a *de jure* director^(k). S. 2.

Manager:—A manager is the principal officer of the company who, subject to the control of the directors, transacts all the business of the company. He is not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole of the affairs of the company^(l). The term also includes a manager *de facto*^(m).

Managing Agent:—He is a person in whom all the affairs of the company are vested in pursuance of an agreement with the company, represented by the board of directors. Under sec. 87A he shall not hold office for a period exceeding twenty years from the date when he assumes the functions of a managing agent. Even though the duration of his office is fixed by the articles and memorandum he is bound to relinquish office at the expiry of the said term, unless he is reappointed to the said office before the expiry of the said period of twenty years. He is an officer within the meaning of the expression in sec. 2 (1). He has no implied authority to purchase on behalf of the company he represents the liability of a stranger, much less of his own partner in a private transaction⁽ⁿ⁾.

Memorandum:—The memorandum of association is the most essential document which a company is required to have; it is its charter and sets a limit to the extent of its corporate powers. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation; and

(j) *Ferguson V. Wilson* (1866) L.R.2 Ch. App. 77.

(k) *Coventry & Dixon's Case* (1880) 14 Ch.D. 670; *Hope Mills V. Sir Cowasji* (1911) 13 Bom. L.R. 162.

(l) *Gibson Vs. Barton* (1875) L.R. 10 Q.B. 336.

(m) *Western Counties, etc. Coy.* (1897) 1 Ch. 629.

(n) *Raja Bahadur Shivalal Motilal V. Bombay Cotton Coy.* (1915) 17 Bom. L.R. 484.

- S. 2.** negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any purpose other than that which is so specified^(o).

The objects for which the memorandum is registered are two: The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk; and the second is that any one who shall deal with the company may know without reasonable doubt, whether the contractual relation which he contemplates entering into with the company is one relating to a matter within its corporate objects ^(p).

Secretary: His powers and duties:—Every company almost always has a secretary. He is generally appointed by an instrument in writing. He has to be present at all the meetings of the company, and of those of the directors. He has to make a minute of all the proceedings at a meeting. He keeps the books of the company, issues notices to members, and carries on correspondence on behalf of the company. But above all, he has to make the returns to the registrar of companies. He has no power to make representations on behalf of the company, to the public to take shares^(q). If he does make any representation, it does not operate as an estoppel as against the company^(r). He is not authorised to request the directors to make advances for the benefit of the company^(s). But if he commits a fraud purporting to act in the course of business such as he was authorised or held out as authorised, it may render the company liable, even though the fraud might have been committed for his own benefit^(t). He has no authority without the sanction of the directors to convene a meeting; any such meeting if called is invalid^(u). His powers do not extend to striking the name of any member off the register^(v). He has no power to pass and register a

(o) *Ashbury Rly. Carriage & Co. V. Riche* (1875) L.R. 3 H.L.C. 653.

(p) *Cotman V. Brougham* (1918) A.C. 514.

(q) *Barnett & Co. V. South London Tramway Co.* (1887) 18 Q.B.D. 815.

(r) *George Whitchurch, Ltd. V. Cavanagh* (1902) A.C. 117; *Ruben V. Great Fingall Consolidated* (1906) A.C. 439.

(s) *In re Cleadon Trust, Ltd.* (1939) 1 Ch. 286.

(t) *Lloyd V. Grace Smith & Co.* (1912) A.C. 716.

(u) *Harben V. Philips* (1883) 23 Ch.D. 14.

(v) *Wheatcroft's Case* (1873) 29 L.T. 324.

transfer not approved by the directors^(w).

S. 2.

If the secretary of a company forges the signature of the directors on a number of cheques, this does not estop the company from contending that the signatures are a forgery^(x). If one person is at the same time the secretary of two different companies, the knowledge acquired by him as secretary of one company will not be imputed to the other company, unless there is a duty cast on the first company to communicate the knowledge to the second company^(y). If a secretary accepts a commission not authorised by the articles, he may be proceeded against in an action for misfeasance under sec. 235 of the Act^(z). There can be no specific performance of a contract to employ a person as a secretary,^(a) the reason of the rule being, that in the case of personal service, employment under compulsion could never be satisfactory. If a person has entered into a contract to serve a company, he could not be restrained from committing a breach of such a contract. But if there is a clear negative undertaking on the part of such a person not to serve elsewhere than the particular company, then such a person could be restrained by an injunction from committing a breach of the said agreement^(b).

Private Company:—A private company is one which restricts the right to transfer its shares, prohibits any invitation to the public to subscribe for any of its shares or debentures, and above all, limits the number of its members to fifty, exclusive of persons in the employ of the company. The definition of private company in English law is very extensive, so as to comprise persons who had taken up shares while they were in the service of the company, but have subsequently ceased to be in the said employment. The definition as given in this Act is very restrictive so as to exclude persons who having purchased shares in the company, have ceased to be in its employ.

(w) *Chida Mines V. Anderson* (1905) 22 T.L.R. 26.

(x) *The Kepiti galla Rubber Estate, Ltd. V. The National Bank of India, Ltd.* (1909) 25 T.L.R. 402.

(y) *Fenwick Stobart & Co.* (1902) 1 Ch. 507.

(z) *McKay's Case* (1875) 2 Ch.D. 1.

(a) *Bainbridge V. Smith* (1889) 41 Ch. D.642.

(b) *Whitemore V. Hurdman* (1891) 2 Ch. 416.

S. 3. **3. (1)** The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate:

Jurisdiction of the Courts.

Provided that the Local Government may, by notification in the local official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

PART II.

CONSTITUTION AND INCORPORATION

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council, or of Royal Charter or Letters Patent.

Prohibition of partnerships exceeding certain number.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council or of Royal Charter or Letters Patent.

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.

Scope & Object:—This section provides that not more than ten persons can associate together for the purpose of carrying on the business of banking, or more than twenty persons for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by the individual members thereof, unless such company, association or partnership is registered as a company, under this Act, or unless it is formed in pursuance of an Act of Parliament or Act of the Governor-General in Council, or Royal Charter or Letters Patent.

The section was enacted to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did

S. 4. not know with whom they were contracting, and might be put to great expense which was a public mischief to be repressed^(c). In order that the present section may apply, three conditions must be satisfied:

(1) There must be a company, association or partnership of more than ten or twenty persons, as the case may be.

(2) The company, association etc. must be formed for the purpose of carrying on a business, and

(3) That business must have for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof.

(1) **Number of Members:**—To constitute an association within this clause, there must be a joint relation of more than ten or twenty persons as the case may be, formed for a common purpose, which must be the performing jointly a succession of acts^(d). It will not be sufficient if the relation exists for a purpose which is to be completed by the performance of one act^(e). A firm is not a legal entity recognised by law, and therefore if two or more firms associate themselves together for the carrying on of a business, it will be an illegal association requiring registration, if the number of all the persons who constitute the association exceeds the number of twenty^(f). There can be no partnership when there is no common business common to all the members of an association. In the absence of community of business, a mere provision for sharing profits would not constitute a partnership^(g). The existence of a sub-partner however, does not affect the number of members for the purposes of sec. 4^(h). An association once illegal does not cease to be so merely by the reduction of its members. It ceases to be illegal only by registration or dissolution.

(c) *Smith V. Anderson* (1880) 15 Ch. D. 273.

(d) *Neelamoga V. Appiah* (1906) 29 Mad. 477; *Dawson V. The King* (1939) Rang. 273.

(e) *Smith V. Anderson* (1880) 15 Ch. D. 273.

(f) *Senaji Kapurchand V. Panaji Devichand* (1930) 32 Bom. L.R. 1607.

(g) *The New Moffusil Co. Ltd. V. Rustomji* (1936) 38 Bom. L.R. 406.

(h) *Chandulal V. Keshavial* (1936) 38 Bom. L.R. 486.

(2) **Carrying on of business:**—The expression “carry- S. 4:
ing on” of business implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business⁽ⁱ⁾. The word “business” has a more extensive signification than trade. It connotes every act by which profit may be earned by the members of an association composing it.

(3) **Acquisition of gain:**—The acquisition of gain contemplated may be either by the association or by the individual members thereof^(j). But if the acquisition of gain is not the main object of the association, it does not come within the mischief aimed at by this section^(k). Where the substantial purpose of the association is not to carry on a business for gain, the fact that gain may accrue incidentally or may arise from merely incidental provisions, does not make registration necessary^(l). If an association is formed for the purpose of enhancing the price of its work, by bringing in all the business of the trade into one shop and dividing the prices of the work done amongst the members according to their skill, then it is an association that has for its object the acquisition of gain, and if consisting of more than twenty persons must be registered^(m). A company may be formed for several objects, and if one of the objects be the acquisition of gain, the mere fact that the members of the company, either singly or jointly, propose to dispose of the gain to some charitable object will not prevent it from coming within the prohibition of sec. 4⁽ⁿ⁾. Whatever may be the use to which the gains of the company are to be put, so long as money is to be gained by business, the object of the legislature in intervening will remain^(o). The word “gain” is not limited to pecuniary or commercial profit. It means acquisition, something obtained or acquired^(p). If the association does not

(i) *Smith V. Anderson* (1880) 15 Ch. D. 273 at 278.

(j) *Kraal V. Whympere* (1890) 17 Cal. 804.

(k) *Kraal V. Whympere* (1890) 17 Cal. 809.

(l) *Wigfield V. Potter* (1882) 45 L.T. 612; *Crowthen V. Thorley* (1884) 32 W. R. 330.

(m) *Bhikaji V. Bapu* (1877) 1 Bom. 550.

(n) *Chedi Lal V. Panna Lal* (1929) 52 All. 325 at 328.

(o) *Ibid* at p. 329.

(p) *Tan Waing V. Bo Hein* (1932) 10 Rang. 490; *Shaw V. Benson* (1883) 11 Q.B.D. 563 at P. 580.

- S. 4.** itself "gain" any profit by the business, but the individual members do, this seems to be sufficient to bring the association within the provisions of this section^(q).

Consequences of Non-registration: An association of more than ten or twenty persons as the case may be, formed for the purpose of carrying on a business, having as its object the acquisition of gain, if unregistered is an illegal association^(r). When an association is illegal, the following consequences ensue:

(1) An illegal association cannot enter into any contract^(s). Having no legal existence, it cannot, even through its trustee, enforce a promissory note given to it by its member to secure a loan advanced by it to the member^(t). It cannot also sue for damages for breach of a contract made with it before its registration^(u).

(2) An illegal association cannot contract any debts^(v). It cannot be sued either by a member or an outsider^(w).

(3) It cannot be wound up under the Act, either at the instance of a member or a creditor^(x).

(4) No suit will lie for the partition of assets of an unregistered partnership which consists of more than twenty persons^(y).

(5) It cannot rank as a creditor in the insolvency of an individual, nor can it prove its debt in liquidation proceed-

(6) There is no right of contribution either at law or in equity as between the members of such an association^(zz).

(q) *Shaw V. Benson* (1883) 11 Q.B.D. 563.

(r) *Shaw V. Benson* (1883) 11 Q.B.D. 563.

(s) *Jennings V. Hammond* (1882) Q.B.D. 225.

(t) *Shaw V. Benson* (1883) 11 Q.B.D. 563.

(u) *The Gujrat Trading Co. Ltd. V. Tricumji* (1866) 3 Bom. H.C. 45.

(v) *In re London Marine Inse. Co.* (1869) 8 Eq. 176 at p. 195.

(w) *In re Day* (1876) 1 Ch. D. 699; *Maneckji Sorabji V. C. N. Cama* (1866) 3 B.H.C. 159.

(x) *Padstow Total Loss, etc. Assn.* (1882) 20 Ch. D. 137; *In re Hfracombe Permanent, etc. Society* (1901) 1 Ch. 102.

(y) *Senaji V. Pannaji* (1934) 36 Bom. L.R. 786.

(z) *In re Day* (1876) 1 Ch. D. 699.

(zz) *In re South Wales Atlantic Steamship Co.* (1875) 2 Ch. D. 763.

However, as long as the money subscribed has not been **S. 5.** applied to the illegal objects of the association, a member is entitled to sue for a return of his subscriptions^(a).

Memorandum of Association

5. Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

Mode of forming
incorporated
company.

- (i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or
- (ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or
- (iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

Mode of Formation of Incorporated Company:—Before a Company is formed, it is necessary that seven or more persons (or in the case of a private limited company two or more

(a) *Greenberg v. Cooperstein* (1926) 1 Ch. 657;
U. Sein Po v. U. Rhyn (1929) 7 Rang. 540.

S. 5. persons) must sign a document called the memorandum of association and the signatures of each of these persons must be attested by a witness. The memorandum must be printed, divided into paragraphs and numbered consecutively. Sections 6, 7 & 8 state as to what is to be contained in the memorandum. If the company has a share capital, each member shall write opposite to his name the number of shares he takes, but shall not take less than one share. (See sec. 7(2) & sec. 6). The memorandum is then filed with the registrar for the province in which the registered office of the company is to be situate. Before registering it, the registrar ought to consider whether the requirements of the Act have been complied with, and then only to issue the certificate of incorporation. It is on and from this date that the company becomes a body corporate capable of exercising the functions of an incorporated company. (See sec. 23(2)). At the time of filing with the registrar the memorandum of association the following documents must also be filed for registration:—

- (1) articles of association prescribing internal regulations for the company.
- (2) A list of the persons who have consented to be the directors of the company. (Vide sec. 84(2)).
- (3) A written consent of the directors to act as such directors. (Vide sec. 84(1)).
- (4) A consent in writing by the persons who have consented to act as directors to take up and pay for their qualification shares, if any. (Vide sec. 84(1)), and
- (5) A declaration by an advocate, solicitor or officer of the company that the provisions of Act have been complied with. (Vide sec. 24(2)).

Different kinds of companies:—Under this Act, three different kinds of companies may be formed: (1) A company limited by shares, in which the liability of the members

is limited by the amount remaining unpaid on the shares held S. 6. by him. (2) A company limited by guarantee, and (a) either having, or (b) not having, a share capital. In the case of a company limited by guarantee and having a share capital, the liability of the member is twofold, viz., the amount remaining unpaid on his shares together with the amount stated in the memorandum as the amount which he undertakes to contribute to the assets of the company in the event of its being wound up. In the case of a company not having a share capital, the liability of the member extends upto the amount of the guarantee only. (3) An unlimited company, in which the liability of every member is unlimited.

**Memorandum of
Company limited
by Shares.**

**6. In the case of a company limited
by shares—**

(1) the memorandum shall state—

- (i) the name of the company, with
“Limited” as the last word in its name;
- (ii) the province in which the registered
office of the company is to be situate;
- (iii) the objects of the company;
- (iv) that the liability of the members is limit-
ed;
- (v) the amount of share capital with which
the company proposes to be regis-
tered, and the division thereof into
shares of a fixed amount:

(2) no subscriber of the memorandum shall
take less than one share:

(3) each subscriber shall write opposite to his
name the number of shares he takes.

Memorandum of Company Limited by Shares:—This
section prescribes what is to be the contents of the memoran-
in the case of a company limited by shares,

S. 6. Name of the Company:—Subject to the provisions of sec. 11(3) a company may select any name it likes. But the word "Limited" must be the last word in its name.

Province of registered office:—The memorandum must state the province in which the registered office of the company is to be situate. The place of the registered office fixes the domicile of the company, and notices and other processes may be served at its registered office. The place where the company has its registered office is important, for under section 3, it is only the High Court of the province in which the registered office of the company is situate that has jurisdiction to wind up the company. Though a company may have branches in different provinces, it is only the High Court within whose jurisdiction the registered office of the company is situate, that has jurisdiction to wind it up^(b). But the Local Government may, by notification in the local Official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the High Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district. (Vide sec. 3).

Objects Clause:—The subscribers of the memorandum associated for a legal purpose may bring the statutory corporation into existence and endow such a body with such powers as they like, provided the objects do not conflict with the general law and the provisions of this Act. The "Objects Clause" must state with reasonable certainty the "objects" for which the company is formed. The statement of the company's objects in the memorandum is intended to serve a twofold purpose. In the first place, it gives protection to subscribers, who learn from it the purposes to which their money is to be applied. In the second place, it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk; but the wider such objects, the greater is

(b) *Ooregum Gold Mining Co. Ltd. v. Roper* (1892) A.C. 125 at p. 135.
In re The Travancore National & Quilon Bank, Ltd. (Unreported decision of High Court of Bombay in I. C. No. 21)

the security of those who transact business with the company^(c). A person who deals with the company, is entitled to assume that a company can do everything which it is expressly authorised to do by its memorandum, and need not investigate the equities between the company and its shareholders. * The "Objects Clause" states affirmatively, the ambit and extent of fidelity and power which by law are given to the Corporation and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified^(d). S. 6.

Construction of the "Objects Clause":—When the Act says that the memorandum must "state the objects," the meaning is, that it must specify the objects, that it must delimit and identify the objects, in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined^(e). Where a company puts in the forefront of its memorandum a special object, (as to which definite information can be obtained by intending subscribers for shares) and the subsequent clauses of the memorandum consist of general objects, the reasonable mode of construing the memorandum in ordinary cases, is to say that the object first stated is the paramount object of the company, and that the other objects are ancilliary and subservient to that object^(f). If there are subsidiary objects, it is right to give a liberal construction to these subsidiary objects, to enable the main object of the company to be carried out^(g). But if the objects are ambiguous then such a construction is to be adopted which would bring them within reasonable limits. An objection is sometimes taken, that the objects are widely stated, and that therefore, there is no sufficient compliance with the "Objects Clause," but any such objection is precluded by the certificate of the registrar, which is conclusive evidence that the requirements of the Act have been complied with^(h).

(c) *Cotman V. Brougham* (1918) A.C. 514.

(d) *Ashbury Rly. & Iron Carriage V. Riche* (1875) L.R. 7 H. L. 653, 670.

(e) *Cotman V. Brougham* (1918) A.C. 514 at 522.

(f) *The Coolgardie Consolidated Gold Mines, Ltd.* (1897) 76 L.T. 269, 272.

(g) *Stephens V. Mysore Reefs Co., Ltd.*, (1902) 1 Ch. 745, 749.

(h) *Cotman V. Brougham* (1918) A.C. 514.

S. 6. Doctrine of Implied Powers:—A company is entitled to do not only that which is expressly specified in the memorandum, but also everything which may fairly be regarded as incidental or consequential to the objects for which it is established, unless expressly prohibited either by this Act or by the general law⁽ⁱ⁾. Thus, a company formed for the purpose of selling coal has implied power to open shops, employ labour and buy and hire lorries, trucks and vehicles. It may settle claims and compromise disputes^(j). A company may also pay out expenses properly incurred in getting up and registering the company, as well as pay interest on capital paid up in advance^(k). A trading company has as an incident to its existence an implied power to deal with its property for the beneficial purpose of its business^(l).

Liability of Members:—One of the conditions of the limitation of the liability of a member is that the memorandum shall state the amount of capital with which the company proposes to be registered, divided into shares of a fixed amount. The shareholders' liability is thus limited by the amount unpaid upon his shares, and renders it impossible for the company to depart from that requirement^(m). The dominant and cardinal principle of the Indian Companies Act is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be, and remain a liability upto that limit⁽ⁿ⁾.

Capital:—It is for the promoters of the company to decide upon the amount of share capital with which the company must be registered, and the number of shares into which it is to be divided, and the face value of each share. The "Capital Clause" may thus provide that the share capital of the company shall be one hundred thousand rupees, divided into one thousand shares of one hundred rupees each.

(i) Attorney-General V. Great Eastern Rail Co. (1880) 5 A.C. 473.

(j) Norwich Provident Insurance Society. (1878) 8 Ch. D. 334.

(k) Lock V. Queensland Investment & Land Mortgage Co. (1896) 1 Ch. 397.

(l) Patent File Co. (1870) L.R.6 Ch. App. 83.

(m) Ooregum Gold Mining Co. V. Roper (1892) A.C. 125.

(n) Ibid, 145.

Memorandum of
Company limited
by guarantee.

7. In the case of a company limited S. 7.
by guarantee—

(1) the memorandum shall state—

- (i) the name of the company, with "Limited" as the last word in its name;
- (ii) the province in which the registered office of the company is to be situate;
- (iii) the objects of the company;
- (iv) that the liability of the members is limited;
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount:

(2) if the company has a share capital—

- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;
- (ii) no subscriber of the memorandum shall take less than one share;
- (iii) each subscriber shall write opposite to his name the number of shares he takes.

S. 9. Companies Limited by Guarantee:—In the case of a company limited by guarantee the only feature that distinguishes it from a company limited by shares, is that the memorandum expressly states that every member undertakes to contribute to the assets of the company, in the event of its being wound up, while he is a member or within one year afterwards, for the payment of the debts and liabilities of the company, such amount as may be required, not exceeding a specified amount.

Memorandum of
unlimited Com-
pany.

8. In the case of an unlimited company—

(1) the memorandum shall state—

(i) the name of the company;

(ii) the province in which the registered office of the company is to be situate;

(iii) the objects of the company;

(2) if the company has a share capital—

(i) no subscriber of the memorandum shall take less than one share;

(ii) each subscriber shall write opposite to his name the number of shares he takes.

Printing and sig-
nature of Memo-
randum.

9. The memorandum shall—

(a) be printed,

(b) be divided into paragraphs numbered consecutively, and

(c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature.

Signature of Memorandum:—This section as amended now requires that the memorandum and the articles (Vide

sec. 19) should be printed, be divided into separate paragraphs and numbered consecutively. They should be signed by each subscriber, and his signature must be attested. It is not necessary that he should sign them in person; he may as well appoint an agent to sign them on his behalf^(o). Once the company is registered, a subscriber cannot repudiate his subscription, on the ground that he was induced to sign the memorandum by misrepresentation^(p). And having put his signature, he cannot revoke his undertaking to take up and pay for the shares, set opposite to his name, by asking the promoters to cancel them^(q).

10. A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act:

Restriction on alteration of memorandum.

Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition.

Memorandum of Association:—The memorandum of association is the charter of the company and fixes the ambit and extent of fidelity and power which by law are given to the company^(r). It is in other words, the fundamental and immutable law of the company which is incorporated in virtue of it, and except as to certain particulars laid down in sections 11, 12, 50, 54, 55 and 71 and the proviso to this section, is unalterable. The object of the memorandum is two-fold. The first is, that the intending corporator who contemplates the investment shall know within what field it is to be put at risk. The second is, that any one who shall deal with the company shall know without reasonable doubt, whether the contractual relations into which he contemplates entering

(o) Whitley partners, Ltd. (1886) 32 Ch. D. 337.

(p) Lord Lurgan's case (1902) 1 Ch. 707.

(q) Banwarilal V. Kundun Cloth Mills, Ltd. (1937) 18. Lah. 294.

(r) Ashbury Rly. Carriage & Iron Co. V. Riche (1875) L.R. 7 H.L. 653.

S. 10 with the company, is one relating to a matter within its corporate objects^(a).

This covenant is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions, and it therefore includes within it the engagement that no object shall be pursued by the company or attempted to be pursued except the objects specified in the memorandum. Anything that is laid down in the memorandum, must as a rule, be taken to be one of the "conditions" on which the company is established^(t). The section applies to all "conditions" which usually are essential parts of the constitution of the company. The proviso to the section says that any provision in the memorandum relating to the appointment of a manager or managing agent and matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be "conditions." This is a statutory recognition of the decision of the Bombay High Court in the undermentioned case^(u), where it was held that a clause providing that the company should enter into a contract of agency on the terms indicated in the memorandum was neither a vital part of the constitution of the company, nor a "condition" of the memorandum within the meaning of this section.

Doctrine of *Ultra Vires*:—The Act in effect, prohibits an alteration of the "conditions" of the memorandum except in the cases, and in the mode, and to the extent, for which express provision is made in the Act. It follows therefore, that the company cannot employ its funds for the purpose of any transaction which does not come within the objects specified in the memorandum, and that the company cannot by its articles of association extend its powers in this respect^(v). Contracts entered into by the company for objects contrary to, or in-consistent with the provisions of the memorandum are therefore, *ultra vires* of the company and wholly void.

(a) *Cotman V. Brougham* (1918) A.C. 514.

(t) *Ashbury V. Watson* (1885) 30 Ch. D. 376;
Welshbach. Incandescent Gas Light Co. Ltd. (1904) 1 Ch. D. 87.

(u) *Ram Kumar Potdar V. Sholapur Spinning & Weaving Co. Ltd.* (1934) 36 Bom. L.R. 1907; 1924 A.I.R. Mad. 126 (no longer good law).

(v) *Ashbury Rly. Carriage & Iron Co. V. Riche.* (1875) L.R. 7 H.L. 653.

It is thus illegal for a company even with the unanimous consent of all the shareholders to effect the purchase of its own shares^(w). The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to, all the objects specified. A part of its capital may be lost in carrying on the business operations authorised. Of all this, persons trusting the company are well aware and take the risk. But they have a right to rely on the capital remaining undiminished by any expenditure outside those limits, or by the return of any part of it to the shareholders.

The doctrine of *ultra vires* is based upon good sense, for a company cannot be given a roving commission to do whatever it likes except that which is specified in the memorandum. But the doctrine must be reasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorised, ought not, (unless expressly prohibited) to be held by judicial construction to be *ultra*

Examples of Acts *Ultra Vires*:—(1) A company empowered to erect wharfs, etc. and take tolls has no power to use the funds of the company, to support a bill for the navigation of the river^(y).

(2) It is *ultra vires* for a railway company to enter into a covenant to pay a large sum of money to a member for not opposing the passing of the company's bill in Parliament^(z).

(3) A company has no power in the absence of anything in the memorandum to that effect, to take over the undertaking of another company^(a).

(4) It is *ultra vires* for a company established to carry on the business of a bill-broker and scrivener and for making advances and procuring loans on, and investing in securities, to purchase on behalf of the company, shares in another company and to pay for it out of the company's funds^(b).

(w) Trevor V. Whitworth (1887) 12 A.C. 409.

(x) Attorney-General V. Great Eastern Rly. Co. (1880) 5 App. C. 473.

(y) Munt V. Shrewsbury, etc. Rly. Co. (1850) 13 Beav. 1.

(z) Cooper V. Liverpool Manchester, etc. Jn. Rly. (1857) 6 H.L. 605.

(a) Ernest V. Nicholls (1857) 6 H.L. 401.

(b) Joint Stock Discount Co. V. Brown (1869) 8 Eq. 381.

S. 10 (5) A railway company with ordinary powers has no powers to carry on the business of coal merchants^(c).

(6) A County Council formed to purchase and work tramways has no power to work omnibuses^(d).

(7) It is *ultra vires* for a company to enter into partnership or amalgamation with another company^(e).

Examples of Acts *Intra Vires*:—(1) It is *intra vires* of a company formed for working a patented machine to purchase the patent^(f).

(2) It is similarly *intra vires* of a company to incur debts for the purpose of its business^(g).

(3) It is competent to a company formed for the erection, furnishing and maintenance of a hotel, to let a portion of its premises to the head of a Government department for the purposes of his office^(h).

(4) A company formed to purchase and carry on the business of chemical manufacturers has power to distribute a sum of money for the furtherance of scientific education and research⁽ⁱ⁾.

Cases in which alterations of memorandum are allowed by the Act:—To the positive prohibition enacted in this section, the Act itself allows the memorandum, to be altered in the cases following:

(1) Change of a company's name (Vide sec. 11 (4)).

(2) Alteration of the objects of a company (Vide sec. 12 (1)).

(3) Change of registered office of a company from one province to another. (Vide sec. 12 (1)).

(c) Attorney-General V. Great Northern Rly. Co. (1860) 1 Dr. & Sm. 154.

(d) London County Council V. Attorney-General (1902) A.C. 165.

(e) British Nation Life Ass. (1888) 8 Ch. D. 679.

(f) British & Foreign Cork Co. (1865) 1 Eq. 381.

(g) Russel V. East Anglian Rly. Co. (1850) 3 Mac. & Gov. 104.

(h) James Simpson V. Westminster Palace Hotel (1860) 8 H. L. 712.

(i) Evans V. Brunner, Mond & Co. Ltd. (1921) 1 Ch. 359.

(4) Alteration in share capital (Vide sec. 50), including reorganisation (vide sec. 54), and reduction (vide sec. 55). **S. 11.**

(5) Alteration so as to render the liability of directors unlimited. (Vide sec. 71).

11. (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

(3) Except with the previous consent in writing of the Governor General in Council, no company shall be registered by a name which—

- (a) contains any of the following words, namely, 'Crown', 'Emperor', 'Empire', 'Empress', 'Federal', 'Imperial', 'King', 'Queen', 'Royal', 'State', 'Reserve Bank', 'Bank of Bengal', 'Bank of Madras', 'Bank of Bombay', or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; or

- S. 11.** (b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter:

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.

(4) Any company may, by special resolution and subject to the approval of the Local Government signified in writing, under the hand of one of the Secretaries to such Government, change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

Name of Company:—A company shall not be registered under a name under which a company in existence is already registered, or so nearly resembling that name, as to be calculated to deceive. The principle being, that one person shall not be allowed to represent himself as carrying on the business which is carried on by another⁽¹⁾. Hence a company not registered under this Act, is entitled to restrain a company from getting itself registered under a name closely resembling its own. Registration in contravention of this

(1) *Reddaway v. Banham* (1896) A.C. 199; *Sturterant Engineering Co. v. Sturterant Mills*. (1936) 3 All. E.R. 137. *Henricks v. Montague*.

section is of itself no protection against an action for an injunction by a person, who is prejudiced by the similarity of names. But this provision does not apply to the case of a company which is in the course of being wound up. (Vide sec. 11 (1)). **S. 12.**

Registrar's Powers:—If the registrar acting *bona fide* refuses to register a company, on the ground that it violates the provisions of this section, the Court will not interfere^(k). It is the duty of the registrar to satisfy himself that the provisions of this section have been complied with before he issues a certificate of incorporation, and to refuse registration if he finds that the said provisions have not been complied with.

Change of Name:—If a company wants to change its name, it has to pass a special resolution and obtain a written consent of the Local Government. A copy of the special resolution and the consent of the Local Government, have to be filed with the registrar, who will register the same, and enter the new name on the register. On the issuing by him of a new certificate, the change of name shall be complete. But such change of name shall not affect any rights or obligations of the company and any liabilities incurred by the company under the old name, may be enforced against the company in its new name.

12. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

Alteration of
memorandum.

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(k) *Rex V, Registrar of Coys.* (1912) 3 K.B. 23.

- 9. 12.** (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum; or
- (f) to sell or dispose of the whole or any part of the undertaking of the company; or
- (g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

Alteration of Memorandum:—This section does not give **S 12** to a company a general power to amend but only deals with two kinds of alterations in its memorandum, viz: (1) Changing the registered office of a company from one province to another, (2) Changing the objects of a company so far and only so far as to enable it to do one or other of the things specified in clauses (a) to (g) of sub-sec. (1) of this section.

Change of Registered Office:—In order to enable a company to change its registered office from one province to another, a company has to pass a special resolution and to obtain an order of the Court confirming the alteration. But if the company wants to shift its registered office from one part of the province to another part of the same province, it is only necessary to intimate to the registrar to that effect under section 82, and the provisions of this section do not apply.

Alteration of Objects:—This section also deals with the alteration of the objects of a company and the next following sections up to section 16, prescribe the procedure to be observed for that purpose. A company has to pass a special resolution and obtain a sanction of the Court to the said alterations. The change in the objects which is sought by the company must be for the doing of one or more of the things mentioned in clauses (a) to (g) of this section.

Clause (a):—To carry on its business more economically or more efficiently.

The Act does not enable a company at its will and pleasure to alter its memorandum. One has to see whether or not the main object of the company is maintained and to see whether or not, while that object is maintained, there is something inserted ancillary to that object⁽¹⁾. The alteration which is contemplated must be an alteration which will leave the business of the company substantially what it was before, with only such changes in the mode of conducting it, as will enable it to be carried on more economically or more

(1) Scientific Poultry Breeders' Ass.

S. 12. efficiently^(m). The court has under this clause, authorised a company to borrow and at the same time to give security⁽ⁿ⁾.

Clause (b) :—To attain its main purpose by new and improved means:

Under this clause, where the main purpose of a company was the investment in Government securities, an alteration in the memorandum, giving a power to invest in securities not guaranteed by Government was refused at the instance of a minority of debenture stockholders^(o).

Clause (c) :—To enlarge or change the local area of a company's operation:

Where by the memorandum as it originally stood, the area of the company's operations was limited to India, and the company wanted to remove this limitation so that the business could be carried on in any part of the world, the Court confirmed the alteration of the memorandum, by striking out the word "Indian" from the name of the company^(p).

Clause (d) :—To carry on some other business which under existing circumstances may conveniently or advantageously be combined with the business of the company:

It is not necessary that the new business which the company contemplates starting should be of the same nature as that which it carries on. Provided that the proposed extension is an advantage to the company, the Court will sanction the alteration^(q). Thus, a marine Insurance company has been allowed to alter its memorandum so as to allow it to carry on life, fire, and accident Insurance connected with marine risk^(r). Where the proposed alteration of the name was for the purpose of enabling the company to undertake the supply of electricity and the manufacture of electrical

(m) Cyclists' Touring Club (1907) 1 Ch. 269.

(n) Government Stock & Investment Co. (1892) 1 Ch. 597.

(o) Government Stock Investment Co. (1891) 1 Ch. 649, 652.

(p) Indian Mechanical Gold Extracting Co. (1891) 3 Ch. 538.

(q) National Boiler Insurance Co. (1892) 1 Ch. 306.

(r) Ibid.

appliances for purposes other than telephonic communication **S. 12.** to which it was originally limited by the memorandum, the Court sanctioned the alteration^(a). But it is important in such cases, that the additional business sought to be undertaken must not be destructive of, or be inconsistent with the existing business. It is necessary that the business must be left substantially the same what it was before^(t). An investment and loan company has thus been allowed to undertake the business of a guarantee and finance company^(u). But if the alteration is such as to involve the abandonment of the objects of the company which are of a fundamental character, the Court will refuse to sanction the alteration^(v).

Clause (e):—To restrict or abandon any of the objects specified in the memorandum:

Under this clause a company may either give up, or restrict itself to the carrying on of only a part of its business.

Clause (f):—To sell or dispose of the whole or any part of the undertaking of the company:—

Under this clause a company in the absence of a power to that effect, has no power to transfer its undertaking, either in whole or in part, to another company^(w). The clause is new and has been inserted by the Amendment Act of 1936.

Clause. (g):—To amalgamate with any other company or body of persons:

It is *ultra vires* for a company to enter into partnership or amalgamation with another company unless there is a power to that effect in the memorandum^(x). This clause introduced by the Amendment Act of 1936, now makes it clear that a company may alter its memorandum, either for the purpose of disposing of the whole or any part of its under-

(a) Oriental Telephone Co. (1891) W. N. 153.

(t) Cyclists' Touring Club (1907) J Ch. 269.

(u) Empire Trust (1891) 64 L.T. 221.

(v) Bolson M Eros. Ltd. (1935) W.N. 9; Jewish Colonial Trust (1908) 2 Ch. 287.

(w) Ernest V. Nicholls (1857) 6 H.L. 401.

(x) British National Life Ass. (1878) 8 Ch. D. 679.

S. 12. taking, or to amalgamate with any other company. This clause follows closely, the corresponding clause of the English Companies Consolidation Act, 1929, and the practice in England has been to allow an alteration of the memorandum so as to allow the company to sell its undertaking to another company having objects similar to the objects of the selling company^(y).

Power of the Court to sanction:—When an application has been made to the Court for confirming the alteration, the Court may in the exercise of its discretion sanction the alteration. But before doing so, the Court must be satisfied that notice has been given to the holders of debentures of the company, and to all persons whose interests would be affected by the alteration, and that in the case of creditors entitled to object, either their consent has been obtained, or their debts or claims have been discharged or secured to the satisfaction of the Court. (Vide sub-sec. (3)). But in the exercise of its discretion, the Court is not concerned either with the wisdom or desirability of the proposed alteration. It has power to confirm an alteration in the memorandum involving the abandonment of objects of a fundamental character, and limiting the operations of the company, from a worldwide area to a comparatively small prescribed region^(z). Where the evidence showed that the business of the company which consisted of raising money by shares and loans, and investing the same in the purchase of subscriptions for shares and in other investments could be more conveniently carried on, with less restricted borrowing powers, and that the proposal to give to the company the additional powers of a guarantee and finance company, would enable the company to carry on its business more efficiently and also conveniently and advantageously to combine other business with its original business, the Court confirmed the alteration^(a).

When once the alteration is confirmed by the Court, a printed copy of the memorandum as altered shall, within three

(y) New Westminster Brewery Co. (1911) 105 L.T. 946.

(z) Poole V. National Bank of China, Ltd. (1907) A.C. 229. British & American Trustee & Finance Corporation V. Cooper. (1894) A.C. 399.

(a) The Empire Trust, Ltd. (1891) 64 L.T. 221.

months from the date of the order, be filed by the company **S. 15.** with the registrar, and the registrar, on registration, shall certify the registration under his hand. His certificate shall be conclusive evidence that all the requirements of this Act, with respect to alteration and confirmation have been complied with. The alteration shall not have any effect, until registration thereof has been duly effected, and if not effected within three months next after the date of the order of the Court, such alteration and order and all proceedings connected therewith shall, at the expiration of such period, become absolutely null and void.

13. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

Power of Court when confirming alteration.

14. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Exercise of discretion by Court.

Provided that no part of the capital of the company may be expended in any such purchase.

15. (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his

Procedure on confirmation of the alteration.

S. 16. hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void:

Effect of
failure to
register within
three months.

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

17. (1) There may, in the case of a company S. 17.
limited by shares, and there shall, in the case of a
company limited by guarantee or un-
limited, be registered with the memo-
randum, articles of association signed
by the subscribers to the memorandum and prescribing
regulations for the company.

(2) Articles of association may adopt all or any
of the regulations contained in Table A in the First
Schedule, and shall in any event be deemed to con-
tain regulations identical with or to the same effect as
regulation 56, regulation 66, regulation 71, regulations
78, 79, 80, 81 and 82, regulation 95, regulation 97,
regulation 105, regulation 107 and regulations 112,
113, 114, 115, and 116 contained in that Table:

Provided that regulation 78 shall not be deemed
to be included in the articles of any private company
except a private company which is the subsidiary com-
pany of a public company:

Provided further that regulation 107 shall be
deemed to require that a statement of the reasons why
of the whole amount of any item of expenditure which
may in fairness be distributed over several years, only
a portion thereof is charged against the income of the
year, shall be shown in the profit and loss account, un-
less the company in general meeting shall determine
otherwise.

(3) In the case of an unlimited company or a
company limited by guarantee, the articles, if the com-
pany has a share capital, shall state the amount of share
capital with which the company proposes to be regis-
tered.

(4) In the case of an unlimited company or a
company limited by guarantee, if the company has not
a share capital, the articles shall state the number of
members with which the company proposes to be re-

S. 17. gistered, for the purpose of enabling the registrar to determine the fees payable on registration.

Registration of Articles:—"Articles" means articles of association of a company as originally framed or as altered by special resolution, including so far as they apply to the company, the regulations contained in Table A in the Schedule annexed to this Act. Articles are the rules for the internal government of a company^(b). They stand on a footing quite different from the memorandum. The memorandum states the objects for which a company is formed. Articles are subordinate to the memorandum, and prescribe regulations for the attainment of those objects. In the case of a company limited by shares, there is no obligation to register articles, but in the case of a company limited by guarantee or with unlimited liability, articles must be filed with the registrar for registration. In practice however, every company frames its own articles, as it is generally found that Table A is not sufficiently exhaustive. Whether a company adopts Table A or registers its own articles, the regulations mentioned in section 17 sub-section 2, shall be deemed to be contained in the articles of every company. It therefore follows that any article which is inconsistent with the statutory articles is void.

Contents of Articles:—Articles generally make provision for the way in which the internal administration of a company is to be carried on. The matters with which articles usually deal are: the allotment of shares, the times when calls are to be made, the amount of the calls, the forfeiture of shares on non-payment of the calls, the mode of transfer of shares, the powers of the directors to refuse to register a transfer, the increase of capital, the reduction of capital, the reorganisation of capital, issue of shares with different rights attached, the lien on shares, conversion of shares into stock, the rights and the number of votes to which each shareholder is entitled, the issue of share warrants, the alteration of a company's capital, the calling of

(b) *Mahony v. East Holyford Mining Co.* (1875) 7 H. L. 869; *Royal British Bank v. Turquand* (1856) 6 E. & B. 327.

meetings, right of members to demand a "poll", the powers of the directors and their disqualification, dividends and reserve fund, the way in which the accounts are to be kept, whether the same shall be open to the inspection of members, appointment and duties of auditors, and so on. **S. 20.**

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Application
of Table A.

19. Articles shall—

- (a) be printed;
- (b) be divided into paragraphs numbered consecutively; and
- (c) be signed by each subscriber of the memorandum (who shall add his address and description) of association in the presence of at least one witness who must attest the signature.

Form & Signature of Articles:—Articles shall be printed, divided into paragraphs, numbered consecutively and signed by each subscriber of the memorandum in the presence of a witness who must attest the signature. It is not necessary, however, that the subscriber should sign them personally; he may even appoint an agent to sign the articles on his behalf.^(c)

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add its articles; and any alteration or addition so made shall be as valid

Alteration of
articles by
special reso-
lution.

S. 20. as if originally contained in the articles, and be subject in like manner to alteration by special resolution.

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

Alteration of Articles:—This section gives power to a company to alter or add to its articles at any time, in such manner as it thinks proper. A company cannot contract itself out of its statutory right to alter its articles by any clause contained therein, or even by an agreement with an outsider, independent of and outside the articles.^(d) This power of alteration however, though very wide and extensive, is subject to certain well-known limitations: (1) The articles cannot authorise the company to do anything which is either expressly or impliedly prohibited by this Act. (2) The articles cannot authorise the company to do anything which contravenes the provisions of the memorandum. (3) The articles cannot authorise the company to do anything which is against the general law.

The power of alteration, like all other powers must be exercised, subject to those principles of law and equity, which are applicable to all powers conferred on majorities enabling them to bind minorities. In other words, the power must be exercised *bona fide* and for the benefit of the company as a whole.^(e)

(d) *Eley V. Positive Assurance Co.* (1876) 1 Ex. D. 88.

(e) *Punt V. Symons & Co. Ltd.* (1903) 1 Ch. 506.

A majority of shareholders thus, have no power to pass **S. 20.** an article enabling them to purchase the minority shares compulsorily, on certain terms. Such an article is neither just nor equitable, nor for the benefit of the company as a whole; it is simply for the benefit of the majority, and is therefore invalid.^(f)

Invalid Articles:—An article which empowers a company to issue shares at a discount (except as now provided by sec. 105A); or by way of bonus, is invalid.^(g) A company has no power to buy its own shares.^(h) A clause in the articles which provides that the shares of any shareholder who directly or indirectly commenced any suit, action or other proceeding against the company or its directors, should be forfeited, on payment to him of the full market value is invalid.⁽ⁱ⁾ The right given to a contributory to petition for a winding up, cannot be excluded or limited by the articles.^(j) A company cannot exercise the right to forfeit the shares of a member for debts due from him generally, as distinct from those due from him as a contributory^(k). A payment of dividends out of capital cannot be authorised by the articles.^(l) A company has no authority to apply its funds for objects not defined in the memorandum.^(m) Where special rights are unconditionally given by the memorandum, they cannot be taken away or infringed by the articles.⁽ⁿ⁾

Valid Articles:—An article which provides *bona fide*, for the transfer by a shareholder of his shares during the continuance of a company, in the event of his insolvency, to particular persons at a fixed price which is fair and uniform for all, is perfectly valid.^(o)

(f) *Brown V. British Abrasive Wheel Co.* (1919) 1 Ch. 290; *Allen V. Gold Reefs of West Africa.* (1900) 1 Ch. 656.

(g) *Welton V. Saffery.* (1897) A.C. 297.

(h) *Hope V. International Financial Society.* (1876) 1 Ch. 327.

(i) (1876) 1 Ch. 327.

(j) *Peeveril Gold Mines, Ltd.* (1892) 1 Ch. 122.

(k) *Hopkinson V. Mortimer Harby & Co.* (1917) 1 Ch. 646.

(l) *Flitcroft's Case*, (1882) 21 Ch. D. 519.

(m) *Guinness V. Land Corporation of Ireland*, (1882) 22 Ch. D. 349.

(n) *Ashbury V. Watson* (1885) 30 Ch. D. 376.

(o) *Borland's Trustees* (1901) 1 Ch. 279.

S. 20. An article which provides for the expelling of a shareholder by buying him out in cases where he competes with the business of the company is not invalid.^(p) A restriction which precludes a shareholder altogether from transferring his shares may be invalid, but a restriction which does no more than give a right of pre-emption is valid; it may be for the benefit of the company for instance, that shares shall not be transferred to rivals in the company's trade.^(q) An article compelling a shareholder at any time to transfer his shares to particular persons at a particular price is not void, as being repugnant to absolute ownership or as tending to perpetuity.^(r)

Relation of Memorandum to Articles:—There is an essential difference between the memorandum and the articles. The memorandum contains fundamental conditions upon which alone a company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as shareholders. The articles of association are the internal regulations of the company. In any case, it is certain that for anything which the Act of Parliament says shall be in the memorandum, you must look to the memorandum alone. If the legislature has said that one instrument is to be dominant, you cannot turn to another instrument, and read it in order to modify the provisions of the dominant instrument.^(s) But except in such matters as must by statute be provided for by the memorandum, it is not to be regarded as the dominant instrument, but the articles and the memorandum must be read together; at all events, so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum or to supplement it upon any matter as to which it is silent.^(t)

A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs. It must be

(p) *Sidebottom V. Kershaw, Lease & Co.* (1920) 1 Ch. 154.

(q) *Ontario Jockey Club, Ltd. V. Mc Bride* (1927) A.C. 917.

(r) *New London & Brazil Bank V. Brocklebank.* (1882) 21 Ch. D. 302.

(s) *Guinness V. Land Corporation of Ireland.* (1882) 22 Ch. D. 349.

(t) *Angosture Bitters Ltd. V. Kerr* (1933) A.C. 550.

borne in mind, that the purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this purpose they are entitled to rely on the constituent documents of the company. They have no access to other sources of information. (u)

20A. Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company:

Effect of
alteration in
memorandum
or articles.

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby.

Effect of Alteration in Memorandum or Articles:—This section which is based upon the parallel provision of the English Act of 1929, has been inserted by the Amendment Act of 1936. The said section 22 of the English Act of 1929 was based on the decision in the undermentioned case,^(v) where it was held that an alteration in the rules of a society registered under the Industrial & Provident Societies Act 1892, requiring members of the society to subscribe for additional shares, was not binding on members who had neither voted for the alteration nor had otherwise assented to it. But the provisions of the section do not apply in cases where the member has agreed in writing either before or after the alteration has been made, to be bound thereby.

(u) Egyptian Salt & Soda Co., Ltd. v. Port Said Salt Ass. Ltd. (1931) A.C. 677.

(v) Hole v. Garnsey (1930) A.C. 472.

S. 21.

General Provisions.

21. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

Effect of
memorandum
and articles

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

Effect of Memorandum & Articles:—The memorandum and the articles when registered shall bind the company and the members thereof to the same extent as if they contained a covenant on the part of each member to observe the provisions of the memorandum and the articles. They thus form an implied covenant between the members and the company and the members are therefore, all bound to the company^(w). It necessarily follows from this that the company is entitled to sue its members for the observance of the articles as well as to restrain any breach thereof. The company is also entitled to treat as irregular anything which is done by any member in contravention of the articles.^(x)

The articles are an agreement *inter socios* and in that view, it becomes a covenant between the company and its members.^(y) They constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.^(z) It has been held that a director who was also a member was entitled to sue for an injunction to restrain his co-directors from improperly excluding him from the board meetings.^(a)

(w) *Bradford Banking Co. v. Briggs Son & Co.* (1886) L.R. 12 A.C. 29.

(x) *Pender v. Lushington.* (1877) 6 Ch. D. 70. *Harben v. Phillips*, (1883) 23 Ch. D. 14.

(y) *Browne v. L. Trinidad.* (1887) 37 Ch. D. 1.

(z) *Wood v. Odessa Waterworks Co.* (1889) 42 Ch. D. 636.

(a) *Bainbridge v. Smith* (1889) 41 Ch. D.

Although the articles are a binding covenant between **S. 21.** the company and its members, this is not so as between the company and an outsider. It has therefore been held that a provision in the articles in favour of an outsider, e.g. a promoter, that the preliminary expenses shall be paid to him by the company gives to the promoter no right of action against the company.^(b) Where rights are given by the articles to the members not as such, but in some other capacity, e.g. as directors or policy holders, a person claiming to enforce such rights cannot sue on the articles treating them as a contract between himself and the company; but must make out a contract independent of and outside the articles. Thus, where a clause provided that a certain person should be employed for life as a solicitor to the company and that he should not be removed except for misconduct, and such person during the continuance of the agreement became a member, it was held that it was competent to the company to discontinue his services as solicitor and that no action lay by him for breach of contract.^(c)

Constructive Notice of Memorandum & Articles:—The memorandum and articles, being registered in a public office, are open to the inspection of any person on payment of a small statutory fee. They are therefore, public documents within the meaning of section 74 of the Indian Evidence Act 1872, and any person who deals with the company must be deemed to have notice of everything that is contained in those two documents.^(d) "Every Joint Stock Company has its memorandum and articles open to all who are minded to have any dealings whatsoever with the company and those who so deal with them must be affected with notice of all that is contained in those two documents"^(e). From this it follows, that a person entering into contractual relations with the company is fixed with notice of the extent not only of the company's powers but also of the powers of the directors, as well as of any limitations and restrictions imposed there-

(b) Rotherham Alum Chemical Co. (1883) 25 Ch. D. 103.

(c) Eley V. Positive Assurance Co. (1876) 1 Ex. D. 88.

(d) Ernest V. Nicholls (1857) 6 H.L. 401.

(e) Mahony V. East Holyford Mining Co. (1875) L.R. 7 H.L. 869, per Lord Hatherly.

§ 212 on either by the memorandum or by the articles. Thus, where the articles provide that a contract to be effective must be signed by two directors, a person who deals with the company is bound to see that it is so signed, and if he does not, he is disentitled to sue upon it.^(f)

But the rigour of this rule has to some extent been relaxed by what is known as, "**the rule in Royal British Bank Vs. Turquand**".^(g) This rule provides that though persons who deal with the company are bound to read the Act and the registered documents to see that the proposed dealing is not inconsistent with them, they are not bound to inquire as to the regularity of the internal proceedings. They are entitled to assume that what has been done has been regularly done by the company. It has been held that bankers who have funds of the company in their hands may (acting *bona fide*) lawfully honour the cheques of the directors, signed according to a form sent by them to the bank without being bound previously to enquire whether persons pretending to sign as directors have been duly elected to office.^(h) Also a managing director who draws a bill on behalf of a company, even though without authority, binds the company⁽ⁱ⁾. On the same principle, it has been held that persons who deal with the company are only bound to take notice of the external position of the company, and are entitled to assume that the directors who carry on the business are properly appointed, though in point of fact there might have been an irregularity in their appointment.^(j)

But actual or constructive notice of any irregularity prevents a third person contracting with the company from obtaining the protection of the rule, that matters of internal or indoor management must be deemed by outsiders to have been duly and properly complied with.^(k) Further, if a third

(f) Howard V. Patent Ivory Manufacturing Co. (1888) 38 Ch. D. 156.

(g) (1856) 6 E. & B. 327.

(h) Mahony V. East Holyford Mining Co. (1875) L.R. 7 H.L. 869.

(i) Dey V. Poolinger Engineering Co. (1921) 1 K.B. 77.

(j) County Life Assurance Co. (1870) 5 Ch. App. 288; Mercantile Bank of India V. Chartered Bank (1937) 1 All E.R. 231; T. R. Pratt, Ltd. V. E. D. Sassoon Co., Ltd. (1935) 60 Bom. 326.

(k) Ligget V. Barclay's Bank (1928) 1 K.B. 48.

person is put on inquiry by reason of circumstances under **S. 23.** which the transaction arose, or by the nature of the transaction itself, or by any other surrounding circumstances, and disregards the facts which put him on inquiry, he will not get the benefit of the rule.⁽¹⁾ But people dealing with the company cannot be fixed with notice of all documents on the file of the company.^(m)

Sub-section (c):—Under this sub-section it has been held that money becomes a debt when it becomes due under the articles and memorandum, but money does not become due merely because signatories of the articles and memorandum have undertaken to purchase shares and pay for them.

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

Registration of memorandum and articles.

Registrar's duties:—When the memorandum and articles are filed with the registrar for registration, it is his duty to see the documents to satisfy himself that the provisions of the Act have been complied with, and to refuse registration if he conceives that they have not, as in cases where a company is registered under a name which is prohibited by section 11 sub-sec. 3, or where the objects are unlawful or such as the court will not countenance⁽ⁿ⁾. A discretion *bona fide* exercised by the registrar is final, and the court will not interfere unless it is shown that it is patently wrong.^(o)

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated and in the case of a limited company that the company is limited.

Effect of registration.

(1) Houghton V. Nothard (1928) A.C. 1.

(m) Padamjee & Co. V. Moos (1925) 27 Bom. L. R. 1218; Vishwanath Prasad Jain V. Holyland Cinetone, Ltd. (1939) All. 739.

(n) R. V. Registrar of Companies (1931) 2 K. B. 197.

(o) R. V. Registrar of Companies (1912) 3 K. B. 23.

S. 24. (2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

Effect of registration:—From the date of registration, there comes into existence a legal entity, different altogether from the subscribers to the memorandum, and capable forthwith (subject to section 103) of exercising the functions of an incorporated company.^(p) Important consequences follow from the fact that the company is a legal entity recognised by law: (1) A company may be rendered liable in damages for loss caused due to its negligence.^(q) (2) A company may be rendered liable in damages for malicious prosecution.^(r) (3) A company may be liable in damages for false imprisonment effected by one of its servants.^(s) (4) A company has the same right to property as an individual has.^(t) (5) A company may be held guilty of contempt of Court.^(u) (6) A company may, except in cases where *mens rea* is a necessary ingredient, be held liable for crimes.^(v) (7) A company may be held vicariously liable for the acts of its servants in the course of employment.^(w) (8) A company has been held to be capable of malice in publishing a libel.^(x)

24. (1) A certificate of incorporation given by the registrar in respect of any association shall be con-

(p) *Saloman V. Saloman* (1897) A.C. 22.

(q) *Rainham Chemical Works V. Belvedere Fish Guano Co.* (1921) 2 A.C. 465.

(r) *Cornford V. Carlton Bank* (1899) 1 Q.B. 392.

(s) *Lambert V. Great Eastern Rly Co.* (1909) 2 K.B. 776.

(t) *Union Benefit Guarantee Co. V. Thakorelal* (1935) 37 Bom. L. R. 1033.

(u) *R. V. Daily Mirror Newspaper, Ltd.* (1922) 2 K.B. 230.

(v) *King V. Cory Bros. Ltd.* (1927) 1 K.B. 810.

(w) *Rangoon Electric Tramway & Supply Co. V. Emperor* (1933) 11 Rang. 162.

(x) *Citizens' Life Assurance Co. V. Brown* (1904) A.C. 423.

**Conclusiveness
of certificate
of incorpora-
tion.**

clusive evidence that all the require- **S. 24**
ments of this Act in respect of registra-
tion and of matters precedent and inci-
dental thereto have been complied with,
and that the association is a company
authorised to be registered and duly registered under
this Act.

(2) A declaration by an advocate, attorney or
pleader entitled to appear before a High Court who is
engaged in the formation of a company, or by a person
named in the articles as a director, manager or secretary
of the company, of compliance with all or any of the
said requirements shall be filed with the registrar, and
the registrar may accept such a declaration as sufficient
evidence of compliance.

Conclusiveness of certificate of incorporation:—When
once the registrar issues a certificate of incorporation, this
section provides that such certificate shall be conclusive evi-
dence that all the requirements of the Act in respect of regis-
tration and of matters precedent and incidental thereto have
been complied with, and that the association is a company
duly registered under this Act. The certificate prevents all
recurrence to prior matters essential to registration, amongst
which is the subscription of a memorandum of association by
seven persons, and that it is conclusive that all previous re-
quisites have been complied with.^(y) When once a company
is registered and it is held out to the world as a company
willing to undertake business, willing to receive shareholders
and ready to contract engagements, then it would be most
disastrous if, after all that had been done, any person was
allowed to go back and enter into an examination (it may
be years after the company had commenced trade) of the
circumstances attending the original registration and the
regularity of the execution of the documents originally re-
ceived by the registrar.^(z) In Peel's case, after signature and
before registration, the memorandum was altered without

(y) *Oakes v. Turquand* (1867) 2 H. L. 325.

(z) *Barned's Banking Co.* (1867) L. R. 2 Ch. App. 674.

S. 25. the authority of the subscribers, so materially that in the words of Lord Cairns "the alterations entirely neutralised and annihilated the original execution and signature of the document". The company however, was registered, and the registrar gave his certificate of incorporation. It was objected that the memorandum of association had not been signed by seven or indeed by any subscriber, and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. "But the certificate of incorporation" said His Lordship, "is not merely a *prima facie* answer but a conclusive answer to such objection. When once the certificate of incorporation is given, nothing is to be inquired into, as to the regularity of the prior proceedings". That is a main and direct decision on the point. Even though the memorandum is not signed by seven subscribers as required by section 6, still as a matter of fact, if a certificate of incorporation is once granted by the registrar, it is conclusive for all the purposes.^(a) The certificate of registration is sufficient to incorporate a company, notwithstanding that one of the subscribers was an infant at the time.^(b)

The certificate of the registrar is conclusive evidence that the registration and incorporation were duly effected on the day mentioned in the certificate. This is intended to prevent any inquiry as to the actual date of writing the signature; if it be conclusive, it must be taken as proving the existence of the company on the whole of that day, and it is not competent to inquire at what particular hour of the day the registration was effected and the incorporation took place.^(c)

25. (1) Every company shall send to every member, (at his request and within fourteen days thereof) on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

Copies of memorandum and articles to be given to members.

(a) *Moosa Gulam Ariff V. Ibrahim Gulam Ariff* (1912) 39 I.A. 237.

(b) *Nassan Phosphate Co.* (1876) 2 Ch. D. 610; *Bowman V. Secular Society Ltd.* (1917) A.C. 406.

(c) *Jubilee Cotton Mills, Ltd.*, (1923) 1 Ch. 1; *Hammond V. Prentice Bros. Ltd.* (1920) 1 Ch. 201.

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees. **§ 26.**

25A. (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

Alteration of memorandum or articles to be noted in every copy.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.

Copies of memorandum and articles to be furnished:-

Sections 25 and 25 A provide that the company shall within fourteen days thereof and on payment of a sum of one rupee or such less sum as the company may prescribe, send to every member a copy of the memorandum and articles, with all amendments upto date. If default is made in sending a copy of the memorandum and articles, or if a copy is furnished which is not in accordance with the alteration, the company and every officer of the company who is in default, shall be liable to a penalty of ten rupees.

Associations not for Profit

26. (1) Where it is proved to the satisfaction of the Local Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and applies or intends to apply

ted" in name of

S. 26. its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the Local Government under this section may be granted on such conditions and subject to such regulations as the Local Government thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the Local Government so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members to the registrar.

(4) A license under this section may at any time be revoked by the Local Government, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that, before a license is so revoked, the Local Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

Associations not for profit:—This section enables an association formed not for profit to get itself registered with limited liability, without the addition of the word "Limited" to its name. This happens where an association is formed for the purpose of promoting commerce, art, science, charity or

any other useful object, and the association intends to apply its profits towards the promotion of the said objects. The association must legally be capable of being registered as a company, and the memorandum and articles must prohibit the payment of any dividend to its members. **§ 27.**

But the section does not aim at prohibiting any payment for value received, or payment for services rendered. The payment therefore, to a retired servant of a club, by way of annuity, pension or gratuity is within the powers of the club, as being a payment in furtherance of the best objects of the company^(d).

An association must be registered without the addition of the word "Limited" under a license from the Local Government, and the memorandum must not be altered unless the Local Government is satisfied that the altered objects will leave the company as one falling under this section^(e).

Companies limited by Guarantee.

27. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

Provision as to companies limited by guarantee.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, not

(d) *Cyclists Training Club V. Hopkinson* (1910) 1 Ch. 179.

(e) *St. Hilda's Incorporate College, Cheltenham* (1901) 1 Ch. 359.

S. 28. notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

Companies limited by guarantee:—This section applies to all companies limited by guarantee and formed under this Act. These companies or associations are usually formed for the purpose of mutual insurance. The past members of such companies who have ceased to be members within a year of the commencement of the winding up, are not liable to contribute to the assets of the company, unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act^(f).

PART III.

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS.

Distribution of Share Capital.

28. (1) The shares or other interests of any member in a company shall be moveable property, transferable in manner provided by the articles of the company.

Nature of shares.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

Shares:—A share has been defined as the interest of a shareholder in a company, measured, for the purposes of liability and dividend, by a sum of money, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with the provisions of section 21 of this Act, and made of various rights and liabilities contained in the contract, including the right to a certain sum of

(f) Premier Underwriting Association (1913) 2 Ch. 29.

money^(s). It may also be defined as a right to receive a **S. 28.** certain proportion of the profits of a company and its assets in a winding up as well as other benefits of membership, combined with the obligation to contribute to its liabilities, all of them being measured by a sum of money^(h). Shares are also "goods" within the meaning of that expression in section 2(7) of the Sale of the Goods Act 1930⁽ⁱ⁾.

Different kinds of shares:—The share capital of a company is divided into shares of fixed amount, and each share is distinguished by a separate number; but it is not necessary that all shares should be of the same value. The share capital of a company is generally divided into (1) preference shares (2) ordinary shares, and (3) deferred shares. The rights attached to different classes are usually defined either by the memorandum or the articles. But if the memorandum itself gives to a class of shareholders certain rights and privileges unconditionally, the company cannot alter or modify such privileges given by the memorandum^(j). But if the rights are conditionally given by the memorandum which contains within itself the right to alter them, it is open to the company to alter the rights attached to the different classes of shares^(k). If the memorandum is silent as to the issue of a special class of shares, the articles as originally framed could authorise the company to issue shares with special rights attached^(l). Where however, the memorandum and the articles are silent as to the issue of shares with preferential rights attached, the company may, by a special resolution alter the articles authorising the directors to issue preference shares because there is no implied condition in the memorandum that all the shares are to be on the footing of equality^(m).

Preference shares:—Preference shares are of two kinds. The preference may be either (a) as to dividend, or (b) as to capital. When the shares have a preference as to dividend,

(g) *Borland's Trustee V. Steel Bros. & Co., Ltd.* (1901) 1 Ch. 279.

(h) *Paulin* (1935) 1 K. B. 57.

(i) *Maneckji V. Vadilal* (1926) 50 Bom. 360 (P.C.)

(j) *Ashbury V. Watson* (1885) 30 Ch. D. 516.

(k) *Welshbach Incandescent Gas Light Co., Ltd.* (1904) 1 Ch. 87.

(l) *South Durham Brewery Co.* (1886) 31 Ch. D. 161.

(m) *Andrews V. Gas Electric Co.* (1897) 1 Ch. 361.

S. 28. they are entitled to a fixed rate of dividend before any dividend could be paid to any other classes of shareholders. The preference as to dividend may again be either (1) cumulative or (2) non-cumulative. In the case of cumulative preference shares, where the company makes no profit or a deficiency of profits, the profits for that particular year must be made good out of the profits of the succeeding years. Where the preference shares are non-cumulative, they are entitled to be paid out of the profits of that particular year only. But if the company is wound up before the directors declare a dividend, then even though under the terms of the memorandum the preferential shareholders are entitled to a preferential cumulative dividend, the assets must be divided as capital rateably amongst all the shareholders⁽ⁿ⁾.

In the absence of anything to that effect in the memorandum or the articles, a preference shareholder is not entitled to have his capital paid to him in preference to other shareholders in the event of a winding-up^(o). His right is *prima facie* to rank for a return of capital *pari passu* with the other shareholders. And after the repayment of all paid-up capital, a preference shareholder has a right to share *pari passu* in the surplus assets of the company^(p). Where the articles authorise the raising of preference shares not only as to dividends but also as to capital, then in the event of breaking up, the company might pass a resolution that the preference shareholder may be paid off in priority to the other shareholders^(q). A dividend payable on the declaration which follows a private sale of shares is not apportionable, but goes entirely to the purchaser^(q1).

Ordinary shares:—The ordinary shareholders are entitled to rank for dividend next after the claims of preference shareholders to a fixed rate per cent of their preferential dividend have been satisfied. An ordinary dividend is declared by the directors at a meeting convened for that purpose. Where there are in addition, deferred shares, after a fixed

(n) Crichton's Oil Co. (1902) 2 Ch. 86.

(o) London India Rubber Co. (1866) 14 W.R. 594.

(p) Birch V. Cropper (1887) L.R. 14 A.C. 525.

(q) Bangor & Portmadoc Slate & Slab (1875) L.R. 20 Eq. 59.

(q1) Richards V. Wimbush (1940) 1 Ch. 92.

rate per cent of dividend is declared for ordinary shares, the residue of the profits is distributed between the deferred shareholders. **S. 28.**

Deferred shares:—These are shares of small nominal value generally issued as fully paid-up, and are allotted to the promoters in consideration of some services rendered by them for the company in its formation. They come in for dividends after the preference and ordinary shareholders have been paid their fixed rates of dividend. They are paid from the surplus profits of the company.

Transfer of shares:—The right of a member to transfer a share is a right of property, and it is so absolute that he may transfer it even to a man of straw, with the express purpose of escaping his liability for future calls^(r). The articles of a company provide for the mode of transfer and the restrictions if any, imposed upon it^(s). The right of a member to transfer a share for the purpose of escaping liability was fully considered in "Discoverers Finance Corporation"^(t), where it was held that such a transfer would be valid if the transfer was made *bonafide*, in the sense that the transfer was made out and out, without any obligation or undertaking on the part of the transferor to indemnify the transferee. The only obligation of the transferor is to find out a transferee legally competent to accept the shares^(u). In such a case the transferee is entitled to compel the directors to register the transfer.

As this section gives to a shareholder the right to transfer his shares to any person who is legally competent thereof, the company has no power to deprive a member of this right. But the company may however impose by its articles certain restrictions upon the right of a shareholder to transfer his shares^(v). The company may, therefore, by its articles give to the directors a power to refuse to recognise a transfer, in certain cases of which they do not approve, as in cases where

(r) *De Paas's Case* (1859) 28 L. J. Ch. 769.

(s) *Gilbert's Case* (1870) L.R. 5 Ch. App. 539.

(t) (1910) 1 Ch. 207.

(u) *Lumsden's Case* (1868) 4 Ch. 31.

(v) *Cawley & Co.* (1889) 42 Ch. D. 209.

- S. 28.** a member is in arrears of his calls or when a company has a lien on his shares.

Transmission of shares:—The Act nowhere deals with the devolution of rights in shares on the death of a member or on his becoming insolvent. Such rights are usually dealt with by the articles. (See Table A. Cls. 21, 22, 23). When a member dies his shares vest in his legal representatives and the estate of the deceased is liable to pay calls if the shares are not fully paid^(w). But the legal representatives themselves do not become members of the company unless they choose to get themselves on the register by an application to the company. When they elect to become members they cannot be registered in a representative capacity, but in their own right^(x). Nor is the company entitled to insist on inserting in the register, a statement that certain members are entered on the register as the executors of a deceased shareholder^(y).

When a member becomes insolvent his shares vest in the official assignee, and he is entitled to exercise his statutory right of transfer. Where the shares are onerous, he may by writing within twelve months, disclaim the shares, in which case the company is entitled to prove for the unpaid amount of the shares^(z).

Form of transfer:—The form of transfer is generally indicated by the articles. The transfer must be in writing and must be executed by the transferor and shall be signed both by the transferor and the transferee. After the transfer is so executed, it is handed over by the transferor to the transferee together with the share certificate, which are then lodged by the transferee with the company for registration. The company is not bound to register it at once but is entitled to a reasonable time for the consideration of every transfer lodged with it although not expressly empowered in that behalf by the articles^(a). The company is entitled to make reasonable

(w) Baird's case (1870) L.R. 5 Ch. App. 725.

(x) Leeds Banking Co. (1865) L.R. 1 Ch. App. 231.

(y) T. H. Saunders & Co., Ltd. (1908) 1 Ch. 415.

(z) Hooley (1899) 2 Q.B. 571.

(a) Societe Generale de Paris V. Walker (1885) 11 A.C. 20.

inquiries before registering, and it is the general practice to delay registration, at least till there is an opportunity given to the registered holder to answer a letter of advice that a transfer has been lodged^(b). S. 28.

Blank transfer:—A blank transfer is one which is signed by the transferor leaving a space blank for the name of the transferee. Where a sale or mortgage of shares is sought to be effected, the transferor generally signs and hands over to the transferee such a blank transfer^(c). The intention in such cases is that the purchaser or mortgagee shall be at liberty at any time to fill in the blanks and perfect his security by getting himself registered in the books of the company. A person who takes a blank transfer and a certificate by way of security is an equitable mortgagee and is entitled to sell the shares after reasonable notice to the transferor^(d). If the mortgagee sells the shares to a purchaser who fills in his own name, the purchaser commonly holds them as security for the amount due to the mortgagee^(e). But when the mortgagee himself fills in the name of the purchaser, the purchaser apparently gets a good title^(f).

Forged transfer:—It is the duty of the company to take proper care that it does not accept a forged transfer for registration. If a company acts on a forged transfer, it incurs serious liability, for the registration of the transferee cannot defeat the title of the true owner^(g). A forged transfer is a nullity and the cause of action is the refusal by the company, when the forgery was made known to it, to treat the owner of the shares as such^(h). Even though a letter of advice might have been despatched by the company to the transferor advising him that a transfer has been lodged for registration, the transferor is not bound to reply thereto. If he does not reply, it does not estop him from asserting his rights against

(b) *Ottos Kope Diamond Mines, Ltd.* (1873) 1 Ch. 518.

(c) *Tahiti Cotton Co.* (1874) L.R. 17 Eq. 273.

(d) *Stubbs v. Slater* (1910) 1 Ch. 632.

(e) *Finance v. Clarke* (1884) 26 Ch. D. 257.

(f) *Easton v. London Joint Stock Bank* (1886) 34 Ch. D. 95.

(g) *Davis v. Bank of England* (1824) 2 Bing. 339.

(h) *Dharwar Bank v. Mohamed* (1931) 33 Bom. L.R. 250.

S. 28. the company at any later period⁽ⁱ⁾. Where a company registers a forged transfer, on discovery of the forgery, it may remove the name of the transferee from the register^(j). Where however, the company acting on the transfer issues a certificate to the transferee, then he or a *bona fide* purchaser from him, who has acted thereon, may sue the company in damages^(k). But in order to succeed in such cases the transferee must show that he has acted on the certificate; he has no cause of action if he has acted on a forged transfer^(l). But in such cases the company is entitled to claim indemnity from the person who has induced the company to register the transfer^(m). Where however, a company having had a certificate lodged with it for registration, subsequently returns the same to the transferor in error and so enables the transferor fraudulently to deal afresh with the shares comprised therein, that does not render the company liable, for the company owes no duty of safe custody⁽ⁿ⁾.

Transferor's obligation:—Upon a transfer for value of shares in a company the transferor is under an implied obligation arising from the relation of grantor and grantee constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as the owner of the shares^(o). He is only bound to deliver to the transferee a genuine transfer and the share certificate^(p). Until registration, a transferor is a trustee of the shares for the transferee^(q). But the purchaser takes the risk upon himself of the company approving the transfer and the seller's obligation is discharged by handing over to the purchaser the transfer and the certificate of shares in proper form, and doing nothing either before or subsequently, to prevent the registration of the transferee^(r). But a contract for a sale of shares does not import by the vendor a representation that the company would

(i) *Barton V. L. & N. W. Rail Co.* (1889) 24 Q.B.D. 17.

(j) *Simm V. Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 188.

(k) *Bloomenthal V. Ford* (1897) A.C. 156.

(l) *Simm V. Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 188.

(m) *Sheffield V. Barkley* (1905) A.C. 392.

(n) *Longman V. Bath Electricity Tramways, Ltd.* (1905) 1 Ch. 646.

(o) *Hooper V. Harts* (1906) 1 Ch. 549.

(p) *Skinner V. City of London Marine Insurance Co.* (1885) 14 Q.B.D. 885.

(q) *Hardoon V. Bellios* (1901) A.C. 118.

(r) *Stray V. Russel* (1888) 20 Q.B.D. 582.

register the transfer^(a). And a person who is *sui juris* and **S. 28** beneficially entitled to shares which he cannot disclaim is personally bound, in the absence of a contract to the contrary, to indemnify the registered holder against the calls upon him. The transferee if he accepts the transfer, accepts the shares *cum onere* and impliedly agrees to discharge all liability which may arise in respect of them^(t).

Discretionary powers of directors:—Although a member's right to transfer his shares is absolute, restrictions may be imposed by the company on the right of transfer. The articles usually give discretionary powers to the directors of approving of the person to whom the transfer is made, and of rejecting a transfer on the ground that they do not approve of the transferee. This power is of a fiduciary nature and must be exercised in good faith i.e. legitimately for the purpose for which it is conferred. It must not be exercised corruptly, fraudulently, arbitrarily, capriciously, or wantonly. It must not be exercised for a collateral purpose. The directors must have a due regard for a shareholder's right to transfer shares, they must fairly consider the question of the transferee's fitness at a board meeting and must act in the interest of the company^(u). The directors are not bound out of Court to assign their reasons for disapproving the transfer. But if they choose to do so, then the Court must consider the reasons assigned, with a view to ascertain whether they are legitimate or not^(v). If the reasons given by them are legitimate the Court will refuse to interfere and even though it would not itself have come to the same conclusion^(w). If they are not legitimate the Court would hold that the power has not been duly exercised. Even if the directors do not assign any reason it is competent for any one to show by proper evidence that the directors have not duly exercised their power^(x). A company has a right to refuse to register if a debt is due from the member^(y).

(a) *London Founders Association V. Clark* (1888) 20 Q.B.D. 586.

(t) *Kellock V. Enthoven* (1873) L.R. 9 Q.B. 241.

(u) *Matheran Steam Co. V. Lang* (1931) 33 Bom. L.R. 185.

(v) *Stranton Iron Co.* (1873) L.R. 16 Eq. 559.

(w) *Skinner V. City of London Marine Insurance Corporation* (1885) 14 Ch. D. 882.

(x) *Bell Bros. Ltd.* (1891) 65 L.T. 245.

(y) *Cawley & Co.* (1889) 42 Ch. D. 209.

5. 29. But the directors are not entitled to reject the name of the transferee on the ground that he is the nominee of a person whom they consider as objectionable. They are not entitled to look beyond the register for any purpose^(z). If the directors have an opportunity of exercising the power and they do it on a wrong principle, the power is gone and the right to transfer remains absolute^(a).

Certification of transfer:— *Prima facie*, it is the duty of the transferee to lodge the transfer form and the certificate of shares with the company for registration, but under the recently amended section 34, the transferor may also apply to have the transfer registered. If a vendor wants to transfer all the shares comprised in the share certificate to one person, then there is no difficulty. But if he wants to transfer some of the shares comprised in the certificate and keep the rest for himself, or if he wants to transfer some to one person and the rest to another, the transferor cannot at the same time hand over the share certificate to two intending purchasers. In such a case, the transferor lodges the transfer together with the share certificate with the company and then at his request, the company marks the transfer with the words "certificate lodged" and returns the transfer to the vendor; this is called "certification". This is in other words, a certificate by the company that the person named in the transfer is *prima facie* the registered holder of all the shares comprised therein^(b). Such certification does not import a warranty of the transferor's title or of the validity of such documents, and therefore does not estop the company from impugning the title of the transferee on the ground of the invalidity of the transfer.^(c)

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

Certificate of
shares or stock.

(z) *Pender V. Lushington* (1877) 6 Ch. D. 70.

(a) *Bell Bros. Ltd.* (1891) 65 L.T. 245.

(b) *Bishop V. Balkis Consolidated Co.* (1890) 25 Q.B.D. 512.

(c) *Simm V. Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 188.

Certificate of shares:—This section provides that a certificate under the common seal of the company specifying any shares or stock held by any member shall be only *prima facie* evidence of the title of the member to the shares or stock therein specified. The object of issuing a share certificate is to enable a shareholder to show his title to the shares comprised therein and to enable him to deal with them. It is a representation by the company to all the world that the person in whose name the certificate is made out is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the persons to whom it is given and acted upon in the sale and transfer of shares. (w)

S. 29.

Certificate & certification:—There is a wide and well-recognised difference between a certificate of shares under the seal of the company, and a transfer certification, such as that which appears from the margin of the transfer in question. The latter is not recognised at all by this Act, nor is it even mentioned in the articles and it is therefore useless as evidence of the title of the transferor to the shares sought to be transferred. It is in fact a mere voucher under the hand of the secretary in the name of the company, that certificates or other documents showing in his judgment, a *prima facie* title in the transferor to such shares have been lodged in the office of the company, the object being to enable the transferor to give to the transferee a reasonable assurance that he has or will have the power to make a good title to the shares when the necessity arises for him to do so. (x) A share certificate on the other hand, is a document of title with respect to the shares comprised therein.

Estoppel against the company:—Since a certificate is a declaration by the company that the person in whose name it is made out is the owner of the shares specified therein, the directors are bound to exercise great caution in issuing it. For, if by negligence, a wrong or incorrect certificate is issued, this may entail serious liability on the company. Such a certi-

(w) *Simm v. Anglo American Telegraph Co.* (1879) 5 Q.B.D. 188.

(x) *George Whitchurch, Ltd. v. Cavanagh* (1902) A.C. 117.

Sec 29 ficate may estop the company so as to preclude it from denying its accuracy against any person relying on it, including the person to whom it is issued and that person if put to rest by the certificate, so as to lose his remedy against his transferor is entitled to sue the company in damages.^(y) Even the original transferee is entitled to rely on the estoppel arising from the certificate, but in this case he must show that he has acted or rested on the certificate^(z). But if the transferee takes a forged transfer and is registered in the books of the company and receives a share certificate, this does not estop the company from disputing his title.^(a)

Where the shares are transferred to a purchaser without notice that they are not fully paid, and are registered in the books of the company as such, they must as between the company and the transferee be treated as fully paid shares, and the transferee can give a good title to purchasers from him, whether with or without notice that they were in fact not fully paid.^(b)

But if the certificate is sealed without the company's authority, it is a forgery, and does not estop the company against the holder of the certificate^(c). And in the absence of evidence that the company ever held out its secretary as having authority to do anything more than the mere ministerial act of delivering the share certificate when duly made to the owner of the shares, the company is not estopped by a forged certificate issued by the secretary.^(d)

Where a share certificate issued by the company states that the shares are fully paid, the company is estopped from denying that statement as against the transferee of the shares, who has *bona fide* acted upon that representation. And where such a person is deprived of the shares by the true owner thereof he is entitled to recover from the com-

(y) *Dixon V. Kennaway & Co.* (1900) 1 Ch. 833.

(z) *Balkis Consolidated Co. V. Tomkinson* (1893) A.C. 396.

(a) *Simm V. Anglo American Telegraph Co.* (1879) 5 Q.B.D. 188.

(b) *Burkinshaw V. Nicolls* (1878) 3 A.C. 1004; *Barrow's Case* (1880) 14 Ch. D. 432.

(c) *London South Grayhound Race Courses, Ltd. V. Wake* (1931) 1 Ch. 496.

(d) *Ruben V. Great Fingall Consolidated* (1906) A.C. 439.

pany as and by way of damages, the value of the shares as at the date of the refusal by the company to register. **S. 30**

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

Who are members:—This section specifies the persons who are the members of a company. They comprise of two classes of persons:—firstly, those who have subscribed to the memorandum of association, and secondly, those who have agreed to become members and whose names are entered in the register of members.

Statutory members:—By the mere fact of incorporation, each of the persons who have signed the memorandum is statutorily bound to take up and pay for the number of shares that are set opposite to his name. In such cases, there is no necessity that an allotment of shares should be made. ^(j) The obligation to take up shares is not satisfied by taking a subsequent assignment of fully paid-up shares from a member. ^(k) The only way in which he could escape liability is by showing that there were no shares with the company, and that all shares had been allotted to others. ^(l) But in the absence of any provision in the articles or of an express agreement between him and the company, he is not liable to make any payment in respect of the shares which he subscribes except as and when calls are made upon him in accordance with the provisions of the articles. ^(m) If a director

(e) *Bahia & San Francisco Rly. Co.* (1868) 3 Q.B.D. 585.

(j) *London and Provincial Consolidated Coal Co.* (1877) 5 Ch. D. 525.

(k) *Migotti's case* (1867) L.R. 4 Eq. 238.

(l) *Mackley's case* (1876) 1 Ch. D. 247.

(m) *Alexander Automatic Telephone Co.* (1900) 2 Ch. 56.

S. 30. by signing a memorandum has agreed to take up a certain number of shares, the mere fact that he never accepted them or that they were not allotted to him is immaterial, he is bound to take them up, and no delay will relieve him from that liability.⁽ⁿ⁾ Where a person has subscribed to a memorandum, he cannot repudiate his undertaking on the ground of misrepresentation^(o).

Members by agreement:—In the case of persons other than the subscribers to a memorandum, there must be a contract to take up shares, and their names must be entered on the register of members. In order that there might be a contract to take up shares, there must be an application, and an acceptance thereof evidenced by the allotment, and communication of the allotment to the applicant.^(p)

Application:—An application for the shares may be either verbal or written. It is an offer, and like any other offer, it may at any time before it is accepted be withdrawn by the applicant.^(q) The application may be withdrawn at any time before the letter of allotment is posted. In the absence of the secretary, a notice withdrawing an application may be given to a clerk so as to make it a communication to the company.^(r)

Allotment:—The application for shares must be accepted and this acceptance is evidenced by the communication of a notice of allotment to the person making the offer.^(s) Where an individual applies for shares in a company, there being no obligation on the company to let him have any, there must be a response by the company, otherwise there is no contract.^(t) "Allotment" is the appropriation by a resolution of the directors, or the managing body of the company, of a certain number of shares in response to the application. The allotment must be communicated within a

(n) Tooth's case (1869) 19 L.T. 519; Levick's case (1871) 23 L.T. 838.

(o) Metal Constituents, Ltd. (1902) 1 Ch. 707.

(p) Scottish Petroleum Co. (1887) 17 Ch. D. 373.

(q) Hebb's case (1867) L.R. 4 Eq. 9.

(r) Truumann's case (1894) 3 Ch. 272.

(s) Bellary Electric Supply Co. V. Kanniram (1933) 56 Mad. 391.

(t) Pellatt's case (1867) 2 Ch. App. 527.

reasonable time; otherwise, the applicant is not bound to accept the shares, even if it transpires that he has not withdrawn his application.^(u) When the circumstances are such that the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as the letter of allotment is posted.^(v) Where a person applies for shares and the directors write down his name in the allotment book, they may at any time before the allotment has been communicated to the allottee, alter or cancel the allotment.^(w) If an application is made for shares in a company, there is a sufficient acceptance if the company demands payment towards the value of the shares.^(x) S. 30.

If a company has agreed to allot to a person a certain number of shares upon certain conditions which remain unfulfilled, such person does not become a member, notwithstanding the allotment of the shares to him in part-performance of the agreement incorporating such conditions.^(y) Where according to the articles, only a certain number of persons would constitute a board of directors, an allotment made by a number of directors not constituting the requisite quorum is invalid.^(z) Similarly, if a notice of the meeting is not given to all the directors, the meeting is irregular, and any allotment made either at this meeting or at any adjourned meeting is equally invalid.^(a)

A distinction is made between an allotment and an issue of shares. An issue takes place when the transaction is complete and the allottee has become the complete master of the shares.^(b) An allotment is only a communication of the acceptance to the applicant.

Entry on register:—It is not merely sufficient that there has been an agreement to become a member, it is further

(u) *Ramgate Victoria Hotel Co., Ltd. v. Goldsmid* (1866) L.R. 1 Eq. 109; *Bai Mangu v. Bharatkhand Cotton Mills* (1930) 32 Bom. L.R. 812; *Indian Cooperative, etc. Co. v. Padamsey* (1934) 36 Bom. L. R. 32.

(v) *Henthorn v. Fraser* (1892) 2 Ch. 27.

(w) *Hebb's case* (1867) L. R. 4 Eq. 9.

(x) *Gunn's case* (1867) L.R. 3 Ch. 40.

(y) *Spitzel v. Chinese Corporation, Ltd.* (1899) 80 L.T. 347.

(z) *Sly, Spink & Co.* (1911) 1 Ch. 430; *Hormusji A. Wadia* (1921) 23 Bom. L.R. 1104.

(a) *Portuguese Consolidated Copper Mines, Ltd.* (1889) 32 Ch. D. 160.

(b) *Clarke's case* (1880) 14 Ch. D. 390.

S. 31. necessary that the applicant's name should be put upon the register. In Nicoll's case,^(c) a person applied for a certain number of shares in a company, but his name was not entered on the register. After a number of years the company went into liquidation and he was sought to be put on the list of contributories. It was held that he was not a member, but that he had only agreed to become a member. But if an application is made to become a shareholder *in praesenti* with the avowed purpose of giving the company credit in the neighbourhood and the person on being entered on the register, attends meetings of the shareholders, then it is too late for him to say that he is not a member.^(d) This section, in other words, presupposes not only an agreement to take shares, but also the entry of his name on the register, in order that a person may be called a member.

Rescission of the contract:—A contract to take up shares in a company is subject to the incidents of an ordinary contract; if therefore, a person applies for shares in a company on the faith of certain persons being directors in the company, he is entitled to repudiate the allotment if it transpires that those directors have retired from the company. Where an application to take shares is conditional e.g. that the applicant is to be appointed as the secretary and the condition is not fulfilled the applicant is entitled to have his name removed from the register. If the contract to take shares is voidable at the instance of the applicant, he must take steps within a reasonable time to have his name removed from the register; if he delays and a winding-up commences, it is too late for him to assert that claim after the rights of third parties have intervened.^(f)

31. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

- (i) the names and addresses, and the occupations, if any, of the members and, in

(c) (1884) 29 Ch. D. 421.

(d) Bridger's case (1870) L. R. 5 Ch. App. 305.

(e) Saloon Steam Packet Co. (1868) L.J. 37 Ch. 49.

(f) Hare's case (1869) L.R. 4 Ch. App. 503; Crawley's case (1869) L.R. 4 Ch. 322.

case of a company having a share capital, a statement of the shares held by each member distinguishing, each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member; S. 31.

- (ii) the date at which each person was entered in the register as a member;
- (iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Register of members:—Every company is bound to keep in one or more books a register of its members, and state therein true particulars of the matters specified in this section. The legislature has taken care to provide the register as the means of enabling the persons dealing with the company to know to whom and to what they have to trust. When the legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining first, who the shareholders might be, and secondly, to what extent they would be liable. This is obviously the reason why the Act opens the register to the inspection of all the world indicating very clearly, that the persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. (g)

Under this section joint holders are entitled to arrange amongst themselves which of them shall stand first on the

(g) *Oakes v. Turquand* (1867) L.R. 2 H.L. 325.

S. 32. register of members, and exercise on behalf of all, the right of voting which belongs to all of them collectively. ^(h)

31A. (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

Index of mem-
bers of com-
pany.

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

Index of members:—This section which has been inserted by the Amendment Act of 1936, provides that the company shall keep an index of the names of its members in such form, that the account of any member may be readily ascertained. The register of members together with the index shall, under section 36, be open to inspection. The provisions of this section apply in the case of public companies only.

32. (1) Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or

Annual list
of members
and summary.

(h) *Burns V. Siemens Bros. Dynamo Works, Ltd.* (1919) 1 Ch. 225.

(in the case of the first return) of the incorporation of the company. **3. 32.**

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) the amount of the share capital of the company, and the number of the shares into which it is divided;
- (b) the number of shares taken from the commencement of the company up to the date of return;
- (c) the amount called up on each share;
- (d) the total amount of calls received;
- (e) the total amount of calls unpaid;
- (f) the total amount of the sums (if any, paid by way of commission in respect of any shares or debentures, or allowed by way of discount (in respect of any shares or debentures), since the date of the last return (or so much thereof as has not been written off at the date of the return);
- (g) the total number of shares forfeited;
- (h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;

- S. 32.**
- (i) the total amount of share-warrants issued and surrendered respectively since the date of the last return;
 - (k) the number of shares or amount of stock comprised in each share-warrant;
 - (l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers or managing agents of the company, and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place; and
 - (m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within twenty-one days after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures

of the company, and where the annual return discloses **S. 32.** the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty.

(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Annual list of members and summary:—Every company limited by shares has, within eighteen months from the date of incorporation, and thereafter, once at least in every year, to prepare a list of its members and a summary as provided in this section. The forwarding to the registrar of joint stock companies, of a list of members and summary which upon the face of them, purport to satisfy the requirements of the Act, is not a sufficient compliance with this section, unless such list and summary are in accordance with the facts. The register is only *prima facie* evidence of certain matters, and upon evidence that it contains fictitious entries, a magistrate would be justified in disregarding them and in treating a summary based upon them as false and misleading. But questions of nicety as to title to shares and the right to be on the register, cannot properly be determined by a magistrate, and with reference to such questions he ought to accept the company's register as practically conclusive⁽¹⁾.

Sub-section (5) provides that if default is made in complying with the provisions of this section, the company and every officer knowingly and wilfully in default is liable to a fine of Rs. 50/- for every day the default continues. If an officer knows of the default and fails to correct it, he is liable under this section⁽¹⁾. It is no defence to a charge under this

(1) Briton Medical & General Life Association. (1888) 39 Ch. D. 61.

(1) Ballaydas V. Mohanlal (1926) 30 Cal. W. N. 1152.

- S. 33.** section for the respondents to rely on the fact that there had been no general meeting held, if the respondents themselves have been parties to the default in holding the general meeting^(k).

33. No notice of any trust, expressed, implied or ~~Trusts not to be entered on re-~~ constructive, shall be entered on the register, or be receivable by the registrar.

Company not affected by trusts:—The object of the legislature in enacting this section was that all persons appearing on the register should have a clear title, not encumbered by the embarrassment which must arise if the legal title were permitted to be affected by notice; or in other words, that the company should not be bound by any trust, and that no notice should have any effect as against the company^(l). In *in re Perkins*^(m), Lord Coleridge, C.J. said, "It seems extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between the trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other persons in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves." The creditors have a right to take as their debtor everybody who is properly on the register, including the trustees for any beneficiary, the object of the section being to free not only the company, but the creditors also from the responsibility of inquiring after those other persons for whom the shares are held⁽ⁿ⁾.

(k) *Park V. Lawton* (1911) 1 K.B. 588.

(l) *Societe Generale de Paris V. Tramways Union* (1884). 14 Q.B.D. 424.

(m) (1890) 24 Q.B.D. 613 at 616.

(n) *Imperial Mercantile Credit Association* (1866) L.R. 3 Eq. 361.

A company to whom a probate was produced for the **S. 34.** purpose of establishing who are the legal personal representatives of the deceased shareholder, is thereby not affected with notice, express or otherwise of the contents of the testator's will^(o). The provisions of this section are applicable to trusts of which the company had knowledge or notice, and in regard to these, the company is not to be bound to see to their execution^(p). If shares in a company stand in the name of trustees, in the winding-up it is the trustees and not the beneficiaries who are liable to be put on the list of contributories^(q). As between the trustee, the company and the *cestui que trust*, the company ignores the beneficiary, but as between the trustee, the beneficiary and a third person, the rights of the *cestui que trust* will be duly given effect to by the Court. Thus, where a trustee created an equitable mortgage of the shares which stood in his name as a trustee, the equitable mortgagee was postponed to the beneficiary as the interest of the beneficiary was prior in point of time to that of the equitable mortgagee^(s).

But this section does not protect the company which in the face of notice that a shareholder is not the beneficial owner of the shares gives credit or makes advances to the shareholder^(s). And where the company in which the shares are held sees fit to deal with the shares for its own benefit, then the company is liable to be affected with notice of the interest of a third party^(t).

34. (1) An application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided that where such application is made by the transferor no registration shall in the case of partly paid shares be affected unless the company gives notice of the application to the trans-

Transfer of
shares.

(o) *Grundy v. Briggs* (1910) 1 Ch. 444.

(p) *Simpson v. Molson's Bank*. (1895) A.C. 270.

(q) *Isaac Bugg's case* (1865) 12 L.T. 696.

(r) *Binney v. Ince Hall Coal Co.* (1866) 35 L.J. Ch. 363.

(s) *Mackereth v. Wigan Coal & Iron Co. Ltd.* (1916) 2 Ch. 293.

(t) *Rainford v. James Keith* (1905) 2 Ch. 147.

S. 34. feree and subject to the provisions of sub-section (7) the company shall, unless objection is made by the transferee within two weeks from the date of receipt of the notice, enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

(2) For the purposes of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post.

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip:

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit.

(4) If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal.

(5) If default is made in complying with sub-section (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be

liable to a fine not exceeding fifty rupees for every day S. 36. during which the default continues.

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any share in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.

Registration of transfers:—An application for the registration of a transfer is usually made by the transferee. This section as amended now enables the transferor to apply to the company to register a transfer, for, until registration the transferor remains the legal owner of the shares and therefore, liable for the payment of calls on shares not fully paid-up. But in cases where the application has been made by the transferor in respect of shares partly paid-up, the company shall not effect the registration unless a notice of the application has been given to the transferee and the transferee has objected within two weeks from the date of the receipt of the notice.

35. A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

36. (1) The register of members, commencing from the date of the registration of the company and the index of members shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not

Transfer by
legal represen-
tative.

Inspection of
register of
members.

S. 36. less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection. Any such member or other person may make extracts therefrom.

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer book of the company are closed, commencing on the day next after the day on which the requirement is received by the company.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for everyday during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.

Right to inspect register and index:—This section provides that the register and the index of members shall be kept at the registered office of the company for inspection of any member gratis, and to the inspection of any other person on payment of one rupee or such less sum as the company may prescribe for each inspection. In proper cases, a member who desires to exercise this right is entitled to do so by an agent^(u). The provisions of this section apply only to a com-

(u) *Dodd V. Amalgamated Marine Workers' Union* (1924), 1 Ch. 116.

pany which has not gone into liquidation, . Once the company **3. 38.** goes into a winding-up, a person is not as of right, entitled to inspect the register^(v). The right of a member to obtain a copy of the shareholders' address book is a right within the meaning of this section and an inquiry into his motive would be irrelevant. The appropriate remedy in the event of a company's refusal to supply him with a copy of the register or any part thereof, would be by an injunction to restrain the company from continuing to refuse to supply him, or a mandatory injunction directing a company to supply him with a copy^(w).

Sub-section (2) provides that any member or other person may require a copy of the register or any part thereof or of the list and summary maintained under sec. 31 on payment of 6 as. per every hundred words or a fractional part thereof required to be copied. A company is bound to send it to the applicant within a period of ten days commencing on the day next after the day on which the requirement is received by the company. Where any inspection is refused or a copy is not sent within the proper period, the company and every officer is liable to a penalty and the Court may in addition compel an immediate inspection or direct that copies required shall be sent to the applicant.

37. A company may, on giving seven days' previous notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole forty-five days in each year, but not exceeding thirty days at a time.

Power to
close register.

38. (1) If—

Power of Court
to rectify re-
gister.

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register

(v) *Kent Goldfields Syndicate, Ltd.* (1898) 1 Q.B. 754.

(w) *Davis V. Gas Light and Coal Co.* (1909) 1 Ch. 248.

s. 38.

of members of a company; or

- (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

Rectification of the register:—This section gives to the Court a summary jurisdiction to rectify the register in cases falling within the section. The section is brought into operation so soon as there is a person alleging himself to be aggrieved by an improper entry in, or an omission from the register. It is thereupon open to the person so aggrieved, or to the company or to any member, to come to the Court under this section. The jurisdiction of the Court to interfere

under this section arises only in two cases:—(1) Where the name of any person is entered in or omitted from the register, or (2) default is made or unnecessary delay takes place in entering on the register, the fact of any person having ceased to be a member. **S. 38.**

Where the secretary of a company has struck out the name of a transferee from the register of members, the Court will order a rectification of the register^(x). The Court has under this clause exercised jurisdiction to order the rectification of the register where a transfer has been wrongfully refused^(y), as well as in cases, where forged transfers have been registered^(z), also in cases where a company has improperly forfeited the shares of a member^(a). The court will exercise the right to rectify the register where there has been an *ultra vires* surrender of shares to the company^(b).

Where there is default or unnecessary delay in registration, it will entitle the applicant to an order for rectification by entering his name on the register. A director cannot by wilfully refusing to attend board meetings prevent the transfers from being registered, and the transferees under the circumstances are entitled to an order directing the company to register the transfer^(c). If owing to non-attendance of the directors, a new share certificate in respect of shares lodged is not sealed, the company is guilty of unnecessary delay and a transferor whose name might have been removed but for such default, is entitled to have his name removed from the list of contributories^(d). The same principle has been applied where the company has been guilty of laches in not complying with the transferees' request for registration^(e).

Jurisdiction discretionary:—Under this section, there is unlimited jurisdiction vested in the Court to rectify the regis-

(x) *Indo-China Steam Navigation Co.* (1917) 2 Ch. 100.

(y) *Stranton Iron & Steel Co.* (1873) 16 Eq. 559.

(z) *Bahia & San Francisco Railway Co.* (1868) L. R. 3 Q.B. 584.

(a) *Ystalyfera Gas Co.* (1887) W.N. 30.

(b) *Bellerby V. Rowland & Marwood's Steamship Co.* (1902) 2 Ch. 14.

(c) *Sussex Brick Co.* (1904) 1 Ch. 598.

(d) *Joint Stock Discount Co.* (1867) 36 L.J. Ch. 472.

(e) *Manchester & Oldham Bank* (1885) L.J. 54 Ch. 926.

S. 38. ter, though there is a discretion in the Court whether it ought to rectify the register or not^(f). On an application to rectify the register, the Court will have regard to who is the applicant; and where owing to the default of the company a transfer has not been registered, the Court will not rectify the register on the application of the liquidator, whatever may be the rights of the transferor to have it rectified^(g). Where a mortgagee of shares applies to have the register rectified the Court may direct an account to be taken of what is due to the mortgagee, and in the event of the mortgagor declining to take such account, will order the mortgagee to be put on the register^(h).

The Court has power to order rectification by the insertion of a transferee's name in cases where the transferee has taken a transfer of shares after the making of a compulsory winding-up order. But the exercise of the power is discretionary and the order will not be made except on strong grounds⁽ⁱ⁾.

The effect of this section is to admit equitable principles into the decision of questions arising under it. A member is therefore, entitled to transfer his shares to nominees of his own, in order to control a right of voting and if the transferees are refused to be put on the register the Court will make an order for rectification accordingly^(j). The Court will on the application of the director-shareholder exercise its powers compelling registration, provided there is no equity against him as director, such as having been party to a postponement of a call to enable him to get rid of his shares and to evade liability^(k). Where the transfer is not carried in, in such time as to give the directors an opportunity of considering whether it should be sanctioned or not and a winding-up intervenes the Court will not order the name of the transferee to be substituted for that of the transferor^(l).

(f) *Kimberley North Block Diamond Co.* (1888) 59 L.T. 579.

(g) *Sichell's case* (1867) L.R. 3 Ch. App. 119.

(h) *The Tees Bottle Co., Ltd.* (1876) 33 L.T. 834.

(i) *Onward Building Society*, (1891) 1 Q.B. 263.

(j) *Stranton Iron & Steel Co.* (1873) L.R. 16 Eq. 559.

(k) *Cawly & Co.* (1889) 42 Ch. D. 201.

(l) *Shepherd's Case* (1866) L.R. 2 Ch. App. 16.

Right of suit for purposes of rectification:—Under this **§. 40.** section the right of rectification of the register can be obtained by a mere application. This does not however, take away the right of a member to obtain relief by a regular suit. Thus, a person is entitled to have his name removed from the list of contributories and the register of members, if the relief is founded upon fraud or misrepresentation, and this he can do, even though between the date of his filing the suit and the decree of the Court, the company goes into liquidation^(m). Where a surrender of shares has been illegally accepted, the Court will in an action against the company order the name of the member to be restored to the register even after the lapse of years, the shares not having been re-issued meanwhile⁽ⁿ⁾. And where shares are registered jointly in the names of two or more persons, but the first-named holder is alone entitled to vote, in order to effectively exercise their voting power in all circumstances, the holders may by suit obtain an order splitting the holding into two different holdings, with their names in different order, and the register will be altered accordingly^(o).

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar within a fortnight from the date of the completion of the order.

Notice to registrar of rectification of register.

40. The register of members shall be *prima facie* evidence of any matter by this Act directed or authorised to be inserted therein.

Register to be evidence.

Register to be Evidence:—The register of members is, under this section, only *prima facie* evidence of the matters directed or authorised to be inserted therein. It is, as a matter

(m) *Reese Rivers Silver Mining Co. V. Smith* (1869) L.R. 4 H.L. 64.

(n) *Trevor V. Whitworth* (1887) 12 A.C. 409; *Bellerby V. Rowland & Marwood's Steamship Co., Ltd.* (1902) 2 Ch. 14.

(o) *Burns V. Siemens Bros., etc.* (1919) 1 Ch. 225; *T.H. Saunders & Co. Ltd.* (1908) 1 Ch. 415.

S. 41 of policy of very great importance to make the register of companies as conclusive as, consistently with the proper interpretation of the Act, you are able to do. But it is perfectly clear that you cannot make the register absolutely conclusive. There are many cases in which the register is not conclusive, e.g. where the names are put upon the register without authority, or the company has been in default in removing the names after the owners have ceased to be shareholders, as well as, in cases where the name of any person is without cause entered in or omitted from the register^(p).

Where penalties are sought to be enforced before a Magistrate, he would be justified in disregarding the entries in a register upon proof that the same are untrue^(q).

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in United Kingdom a branch register of members (in this Act called a British register).

Power for company to keep branch register in the United Kingdom.

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Power to keep British Register:—This section authorises the company, if so authorised by its articles, to keep a regis-

(p) Reese River Silver Mining Co. Ltd. v. Smith (1869) L.R. 4 H.L. 64.

(q) Britain Medical & General Life Ass. (1888) 39 Ch. D. 61.

ter of its members in the United Kingdom, which is called a **S. 42.** "British Register". It can only be kept by a company having a share capital. Within one month from the opening of the British register, a company is required to file with the registrar, a notice stating the situation of the office where such British register is kept, and in case of any change in the situation of the said office, to inform the registrar within the like period of time. Default in complying with the provisions of this section entails on the company a serious liability.

When a company has maintained a British register, the register of members of the company is called a "principal register". During the continuance of the British register, the entries in the same cannot be transferred to the principal register. It is only when the British register is discontinued, that all entries in that register shall be transferred to the principal register and notice of such discontinuance shall be given to the registrar.

42. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

Regulations as
to British re-
gister.

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares

S. 45. registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

43. (1) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

Issue of share warrants to bearer.

(2) Nothing in this section shall apply to a private company.

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

Effect of share-warrant.

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a

Registration of name of bearer of share-warrant.

bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled. **S. 48.**

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

Position of bearer of share-warrant.

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member and shall enter in the register the following particulars, namely:—

Entries in register when share-warrant issued.

- (i) the fact of the issue of the warrant;
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and
- (iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

48. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender,

Surrender of

S. 49. the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

Share-Warrants to bearer:—A "Share-Warrant" is a document issued by a company under its common seal stating that the holder of the warrant is the owner of certain shares or stock therein specified. It can only be issued by a company, if such power rests in the articles, and only in respect of fully paid shares or stock. The power of issuing share-warrants can only be exercised by companies having a share capital. A share-warrant entitles the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant. By custom, share-warrants to bearer have been recognised as negotiable instruments^(r). Where a share-warrant is issued, the name of the prior owner of the shares is struck out of the register. Where the articles require the holding of a certain number of shares as a qualification for acting as a director, the holding of share-warrants is not a sufficient qualification. As long as a share-warrant is outstanding there will be no registered holder of those shares in the books of the company.

A private company however, has no power to issue share-warrants in respect of shares or stock fully paid-up. The reason of this rule is that if there were such a power, share-warrants being negotiable, could be transferred by mere endorsement to any number of persons, in which case the company would cease to be a private company.

49. A company, if so authorised by its articles, may do any one or more of the following things, namely:—

- | | |
|---|---|
| <p>Power of company to arrange for different amounts being paid on shares.</p> | <p>(1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;</p> |
|---|---|

(r) Webb Hale & Co. V. Alexandria Water Co. (1905) 25 T.L.R. 572.

- (2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up;
- (3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

Powers of company:—Sub-sec. (1):—Difference in the amounts of calls:—In the case of a company limited by shares, there is a presumption of equality between all the shareholders. Where there is a power given to the company similar to that contained in the clause 16 of Table A, then only is it competent to the company to make a call on some shareholders to the exclusion of the rest. But in the absence of such a power in the articles, a company has no power to make calls upon certain members without making similar calls on others^(s). Under this sub-section it is not competent to a director to use the power of making calls in his own interest^(t).

Sub-section 2:—Payment of money in advance of calls:—Clause 17 of Table A gives power to the directors to accept from any member who assents thereto the whole or any part of the amount remaining unpaid, even though no part of that amount has been called up. Such a power is in the nature of a trust, and must be exercised for the benefit of the company. The directors should receive money in advance, only when they find that the same could be utilised advantageously for the benefit of the company, and not for their own benefit^(u). If the directors exercise the power *malafide* and in their own interest, the Court will set aside the transaction as being a fraud upon their power^(v). Where money has been paid up

(s) *Galloway V. Halle' Concerts Society*, (1915) 2 Ch. 233.

(t) *Gilbert's case* (1870) L.R. 5 Ch. App. 559; *Alexander V. Automatic Telephone Co.* (1900) 2 Ch. 56.

(u) *Poole, Jackson & Whyte's case* (1878) 9 Ch. D. 322

(v) *Syke's case* (1872) 13 Eq. 255.

S. 50. in advance under the power given by the articles, interest on that amount must be paid, whether or not the company makes profit. Where the profits are insufficient, it must be paid out of capital notwithstanding the provisions of sec. 107^(w). Where money is paid in advance of calls, it cannot be returned to a shareholder, as if it were an ordinary loan of which he could require repayment, or of which the company could compel him to accept repayment. But in a winding up, the capital paid up in advance ranks for repayment, *prima facie* before capital not paid up in advance^(y).

Sub-section (3):—Payment of dividends in proportion:—This sub-section must be read along with clause 98 of Table A. Where money has been paid up in advance it is lawful for the company to pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others^(z).

50. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

Power of company limited by shares to alter its share capital.

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;
- (c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination;
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that

(w) *Lock V. Queensland Investment & Land Mortgage Co.* (1896) A.C. 461.

(x) *London & Northern Steamship Co. Ltd. V. Farmer* (1914) 111 L.T. 204.

(y) *Wakefield Rolling Stock Co.* (1892) 3 Ch. 165.

(z) *Lock V. Queensland Investment & Land Mortgage Co.* (1896) A.C. 461.

in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived: **S. 50.**

- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section must be exercised by the company in general meeting.

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(4) The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.

Different kinds of capital:—The word "Capital" is used in different senses according to the context in which it occurs:—

(1) **Nominal or authorised capital:**—It is the amount with which a company proposes to be registered, divided into shares of a fixed amount. The amount of the capital is expressly stated in the memorandum e.g. Rs. 100,000 divided into 1000 shares. The amount of the nominal capital is one of the essential conditions of the constitution of the company, and cannot be increased or diminished except in conformity with the provisions of the sections 50, 54 & 55 of the Act.

(2) **Issued capital:**—It is generally found that the company does not require to offer all its share capital for public subscription. A company may therefore offer a part of its

§. 50. nominal capital to the public for subscription e.g. Rs. 50,000. This capital which is so offered to the public for subscription (viz: 500 shares of the face value of Rs. 100 each) is called the "issued capital".

(3) **Subscribed capital:**—It might be that all the issued capital has not been taken up by the public. For example, out of the issued capital of Rs. 50,000, only Rs. 40,000, might have been subscribed for, by the public. The amount so subscribed for, is called the "subscribed capital", provided all of it has been allotted by the company to the applicants.

(4) **Called-up capital:**—A company may issue shares either as fully or as partly paid. When it issues its shares as fully paid, the whole amount of the issued capital is called the "Called-up capital". If the company issues its shares as partly paid, then the total amount of the call money on account of the issued share capital is called the "Called-up capital". For example, on an issued capital of Rs. 50,000, (viz. 500 shares of Rs. 100) a call of Rs. 30 per share may be made, in which case the sum of Rs. 15,000 is the amount of the "called-up capital".

(5) **Paid-up Capital:**—Although the company may call up the "called-up capital", it is not possible for the company to realise from the shareholders the whole of the called-up capital. The amount which is actually received by the company from the shareholders is called the paid-up capital. For example, on the called up capital of Rs. 30 per share on 500 shares, only the calls on 400 shares may have been paid, in which case the paid-up capital is a sum of Rs. 12,000.

Unpaid capital:—The balance of Rs. 3,000/- in the above illustration, which has not been actually received by the company, on account of the called-up capital is called the "Unpaid capital" or "Capital in arrears."

Sub-sec. (1) Clause (a):— Increase of capital:—A company limited by shares can increase its share capital only if a power to that effect is expressly given by the articles. Where the articles contain no such power, they must be amended by passing a special resolution so as to take up the

requisite power^(a). Where the articles prohibit the increase of capital, the Court will at the instance of a member, restrain the directors from issuing new shares without the sanction of a special resolution removing the prohibition and taking the requisite power. Notice of a meeting to increase or sanction the increase of the share capital is not sufficient if it merely refers generally to the proposed resolution to increase the share capital. It must show an intention to make the specific increase embodied in the resolution that is actually passed. The shareholders should be protected in matters of this kind, by specific notice of what is intended to be done^(b). Where therefore, a company has no power to issue new capital, the company's power of increasing its capital under the articles having already been exhausted, a person is not, either by his acquiescence or conduct, estopped from denying that he was a member of the company^(c). The increase of capital can be effected only by passing a special resolution.

Where a company has increased its share capital beyond the registered capital, sec. 53 provides that the company shall within fifteen days after the passing of the resolution authorising the increase, file with the registrar a copy of the said resolution, and the registrar shall record the increase.

Clause (b):—Consolidation of shares:—Clause 44 of Table A authorises consolidation. The Act permits the consolidation of shares, followed by a sub-division of shares resulting from such consolidation, to be carried out by a single resolution. This may be effected by passing an ordinary, extraordinary, or special resolution^(d). The company is given power by this clause to consolidate and divide all or any of its share capital into shares of larger or smaller amount than its existing shares. Where shares have been consolidated, sec. 51 provides that within fifteen days of the consolidation, notice shall be filed with the registrar of the same, specifying the shares consolidated and divided.

(a) *Gas Meter Co., Ltd. v. Diaphragm & General Leather Co., Ltd.* 1925 41 T.L.R. 343.

(b) *Mac. Connell v. E. Prill & Co., Ltd.* (1916) 2 Ch. 57.

(c) *Bank of Hindustan, China & Japan, Ltd. v. Alison* (1871) L.R. 6 C.P. 222.

(d) *North Cheshire Brewery Co., Ltd.* (1920) 64 Sol. Jou. 463.

S. 50. Clause (c):—Conversion of shares into stock:—Under this clause, a company may convert all or any of its paid-up shares into stock and reconvert its stock into shares of any denomination. Shares are not necessarily converted into stock, no sooner they are paid-up; they may exist either as paid-up or as not paid-up shares. But as regards stock, they can only exist in the paid-up state. It cannot be stock until it is consolidated, and the shares in a company cannot be consolidated until they are fully paid-up^(e). Shares in a company as shares, cannot be bought up in small fractions. But the consolidated stock of a company can be bought just in the same way as the stock of a public debt, split up into as many portions as you like. Independently of that, stock possesses all the qualities of shares. It is in fact, simply a set of shares put together in a bundle, with this peculiarity added to them, that they are transferable in a manner in which, you cannot transfer ordinary shares in a company^(f).

There is nothing in the Act which expressly or by implication deprives the company of a power to issue warrants to bearer in respect of stock^(g). Such share warrants are recognised by mercantile usage as negotiable instruments^(h).

Where a company has converted any of its shares into stock or reconverted stock into shares, it shall, under sec. 51, within fifteen days of the conversion or reversion file notice of the same with the registrar.

Clause (d):—Sub-division of shares:—Under this clause a company may sub-divide its shares into shares of a smaller denomination. On the shares, after sub-division, the amount remaining unpaid must be proportionate to the shares from which the reduced share is derived. Thus, if the shares were of the face value of Rs. 100|- on which a sum of Rs. 50 was paid up, they may be sub-divided into two shares of the face value of Rs. 50 each, with a sum of Rs. 25 paid up on each share.

(e) *Morrice V. Aylmer* (1875) L.R. 7 H.L. 717.

(f) *Ibid* at page 275.

(g) *Pilkington V. United Rlys. Warehouse, Ltd.* (1930) 2 Ch. 109.

(h) *Webb, Hale & Co. V. Alexandra Water Co., Ltd.* (1905) 25 T.L.R. 572.

Clause (e):—Cancellation of shares:—This clause provides that a company may cancel shares which at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled. Under sub-section (4) notice of the cancellation of unissued share capital must be given to the registrar from the passing of the resolution. But a cancellation of shares pursuant to the provisions of this section does not amount to a reduction of share capital within the meaning of section 55 of the Act. S. 50.

Reorganisation of share capital:—This section applies only to two modes of reorganising the share capital, viz, (1) the consolidation of shares of different classes into one class of shares, and (2) the division of shares into shares of different classes. It does not apply where the company proposes to abolish existing classes of shares and to create a new class of shares all to stand on the same footing⁽ⁱ⁾. The consolidation contemplated by the section is the conversion of two or more classes of shares with different rights attached into one class of shares, all having the same rights^(j). Under this clause the company may provide for the consolidation of deferred shares, so that two such shares should form one new deferred share of a higher value, standing on the same footing as the ordinary share^(k). The company may divide its original existing ordinary shares paying a fixed dividend, into ordinary and deferred shares^(l).

But where the modification of the memorandum does not involve the consolidation or division of shares but only seeks to affect the special privileges attached to a particular class of shares this section does not apply^(m). In other cases of reorganisation of share capital, the provisions of the memorandum may be altered, as part of an arrangement under sections 153, 153A, 153B and 215 of the Act⁽ⁿ⁾.

(i) *E. D. Sassoon United Mills, Ltd.* (1928) 30 Bom. L.R. 538.

(j) *North Cheshire Brewery Co.* (1920) W.N. 149.

(k) *British India Corporation V. Shanti Narain* (1935) 57 All. 810.

(l) *Garden Village (Hull) Ltd.* (1923) 1 Ch. 230.

(m) *J. A. Nordberg, Ltd.* (1915) 2 Ch. 439.

(n) *Schwepps, Ltd.* (1914) 1 Ch. 322.

S. 52. To effect a reorganization the procedure laid down in this section must be complied with, which (1) requires the passing of a special resolution and (2) an order of the court confirming such resolution. When the court makes an order, a certified copy thereof shall be filed with the registrar within twenty-one days of the making of the order.

The proviso to sub-section limits the operation of the section by providing that where any preference or special privileges attached or belonging to any class of shares is sought to be interfered with, a resolution must be passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class^(o).

51. (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

Notice to registrar of consolidation of share capital conversion of shares into stock, etc.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

52. Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is con-

Effect of conversion of shares into stock.

(o) Foucar & Co. (1913) W. N. 83; Australian Estate & Mortgage Co. (1910) Ch. 414.

verted into stock; and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act. **S. 54.**

53. (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where
Notice of increase of share capital or of members. a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing, of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.

(3) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

54. (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by
Reorganisation of share capital. the division of its shares into shares of different classes;

S. 54A. Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and every resolution so passed shall bind all shareholders of the class.

(2) Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed.

Reduction of Share Capital

54A. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66.

Restrictions on purchase by company or loans by company for purchase of its own shares.

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company

who is knowingly and wilfully in default shall be liable S. 55. to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 105B.

Purchase by a company of its own shares:—This section introduced by the Amendment Act 1936, provides that a company limited by shares has no power to buy its own shares^(p), or those of a public company of which it is a subsidiary company unless the capital of the company is reduced with the sanction of the court. But where a company is under an obligation to purchase its own shares not for profit, but for carrying into effect an arrangement entered into by it with its member, the purchase does not amount to a reduction of the capital, so as to come within the prohibition of this section^(q). A purchase of its own shares by a company is no doubt invalid, but where the shares stand in the name of a nominee for the company, the transaction does not amount to a purchase of the shares, merely because the nominee votes as directed by the company^(r). The case is the same, where an agreement provides that a retiring director should transfer his holding to another director and the price for the same is to be paid by a cheque drawn on the company's account^(s).

55. (1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

Reduction of
share capital:

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
- (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is

(p) *Trevor V. Whitworth* (1887) 12 A.C. 409.

(q) *Rowell V. John Rowell & Sons* (1912) 2 Ch. 609.

(r) *Kirby V. Wilkins* (1929) 2 Ch. 444.

(s) *Spink (Bournemouth), Ltd. V. Spink*, (1936) Ch. 544.

S. 55.

lost or unrepresented by available assets;
or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act called a resolution for reducing share capital.

Reduction of share capital:—This section and the following sections upto sec. 65 deal with the reduction of the share capital of a company. In order to effect a reduction of share capital, it is necessary:

(1) That a power to reduce should exist in the articles. A power in that behalf in the memorandum only is insufficient^(t). If the articles therefore, contain no such power, they must be altered by special resolution giving the company the requisite power, and then passing a special resolution authorising the reduction in the manner proposed.^(u)

(2) To pass a special resolution to reduce the share capital. A special resolution, under this section is in this Act called a resolution for reducing the share capital. The resolution to reduce the capital, must itself show with sufficient exactitude the mode in which the reduction is to be effected, e.g. that the present capital of Rs. 100,000 is to be reduced to Rs. 50,000, divided into 1,000 shares of Rs. 50 each, and that such reduction be effected by cancelling the present liability to Rs. 50 per share and reducing the nominal value of each share to Rs. 50; or that the capital of the company may be reduced from Rs. 100,000, divided into 1,000 shares of Rs. 100 each to Rs. 50,000 divided into 1,000 shares of Rs. 50 each, and that such reduction be effected by cancelling the paid-up capital which has been lost or is unrepresented by available assets to the extent of Rs. 50, and by reducing the

(t) *Dexine Patent Packing & Rubber Co.* (1903) W.N. 82.

(u) *Patent Invert Sugar Co.* (1885) 31 Ch. D. 166.

value of the shares from Rs. 100 to Rs. 50, or that the share capital of the company may be paid off to the extent of Rs. 50 per share, on the footing that the same will be called up as and when required by the company. **S. 55.**

(3) That an order of the Court should be obtained confirming the reduction of share capital. Where an application is made to the Court, the condition that gives the Court jurisdiction is not the proof of the loss of capital or that the capital is unrepresented by available assets, or that it is in excess of the wants of the company ; the jurisdiction arises whenever the company seeking reduction has duly passed a resolution to that effect^(v). The Act leaves it to the prescribed majority of the shareholders whether there should be a reduction, and the extent, the mode and incidence of such reduction^(w). Since the decision in *Poole V National Bank of India*^(x), the practice has been to dispense with proof of the existence of the facts referred to in the resolution, at any rate where there is no reason to suspect the *bona fides* of the parties^(y). The resolution will be confirmed by the Court if it is fair and equitable, even though the rights of shareholders *inter se* may be altered^(z). An order ought not to be refused unless there is something unjust or inequitable in the proposed reduction.^(a) The Court will sanction the reduction of a company's capital in respect of unpaid share capital which could not be realised except in the event of and for purpose of winding up, the company being in a prosperous condition^(b). But the Court will refuse to confirm a proposed reduction where the company has ceased to carry on trade, the real object of the petition being the distribution of the available assets by the machinery of reducing the capital^(c). But the fairness or the unfairness of the scheme of reduction is not a matter for the exercise of judicial discretion in a technical sense, but a question for the Court to decide on the evidence.^(d)

(v) *The Marwari Stores, Ltd. V. Gourishanker Goenka*, (1936) 63 Cal. 703.

(w) *British & American Trustee & Finance Corporation V. Couper*. (1894) A.C. 399.

(x) 1907 A.C. 229.

(y) *Caldwell & Co. V. Paper Makers, Ltd.* (1916) W.N. 70.

(z) *Credit Assurance & Guarantee Corporation* (1902) 87 L.T. 216.

(a) *The Barrow Hematite Steel Co., Ltd.* (1888) 39 Ch. 582.

(b) *Midland Rly. Carriage & Waggon Co.* (1907) 23 T.L.R. 661.

(c) *Wallsey Brick & Land Co. Ltd.* (1894) L.J. 63 Ch. 419.

(d) *Carrutt V. Imperial Chemical Industries, Ltd.* (1937) 53 T.L.R. 524.

S. 56. **All-round reduction:**—*Prima facie* a reduction of capital should be an all round one, and this *pari passu* reduction is the proper mode where there are several classes of shares. That is to say, the same percentage is to be paid off or cancelled as lost or unrepresented by available assets, or the same percentage is reduced where the liability on the unpaid capital is sought to be reduced^(e). But where the preference shares have priority as regards capital in the winding up, the loss should first be thrown on the ordinary shares^(f). Where an all round reduction is sought to be effected, it does not necessarily amount to a modification of the rights of the preference shareholders, so as to require their sanction under an extraordinary modification of rights clause^(g). The Court will refuse to sanction the reduction of share capital where it is sought to reduce the amount of its ordinary shares against the will of the holders, while not reducing the amount of certain shares carrying a preferential dividend^(h). But if a proper case is made out for reducing some only of the shares to the exclusion of the others, the Court will confirm the resolution ; thus, if the shares which are to be cancelled have been fully paid up and are to be cancelled with the consent of the holders, the Court will give effect to the resolution⁽ⁱ⁾. But it is competent to a company by a special resolution to reduce its capital otherwise than in accordance with the legal rights of the shareholders, e.g., by cancelling part of the capital paid up on a particular class of shares, although all classes rank evenly as regards capital ; the Court may in such a case confirm the reduction even though it involves a departure from the legal rights of the different classes⁽¹¹⁾.

56. Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

(e) *Bannatyne V. Direct Spanish Telegraph Co.* (1886) 34 Ch. D. 287.

(f) *American Pastoral Co.* (1890) 62 L.T. 625.

(g) *Mackenzie, Ltd.* (1916) 2 Ch. 450.

(h) *Union Plate Glass Co.* (1889) 42 Ch. D. 512.

(i) *Gatling Gun, Ltd.* (1890) 43 Ch. D. 628.

(11) *Thomas de la Rue* (1910) 2 Ch. 361.

57. On and from the passing by a company **S. 58**
of a resolution for reducing share capital, or where the
reduction does not involve either the
diminution of any liability in respect of
unpaid share capital or the payment to
any shareholder of any paid-up share
capital, then on and from the making
of the order confirming the reduction, the company
shall add to its name, until such date as the Court may
fix, the words "and reduced" as the last words in its
name, and those words shall, until that date, be deemed
to be part of the name of the company:

**Addition to
name of com-
pany of "and
reduced".**

Provided that, where the reduction does not in-
volve either the diminution of any liability in respect
of unpaid share capital or the payment to any share-
holder of any paid-up share capital, the Court may, if
it thinks expedient, dispense altogether with the addi-
tion of the words "and reduced".

**Addition of words "and reduced" to name of com-
pany :—**On and from the passing of a resolution for reducing
share capital, the company shall add to its name the words
"and reduced" as part of its name until such date as the
Court directs. Where the resolution does not involve either
the diminution of any liability in respect of unpaid share capital
or the payment to any shareholder of any paid-up capital,
the company shall add the said words to its name on and
from the making of the order confirming the reduction, but in
such cases the Court may if it thinks expedient dispense alto-
gether with the addition of the words "and reduced" (j).

58. (1) Where the proposed reduction of share
capital involves either diminution of liability in respect
of unpaid share capital, or the payment
to any shareholder of any paid-up share
capital, and in any other case if the
Court so directs, every creditor of the
company who at the date fixed by the

**Objections by
creditors and
settlement of
list of objecting
creditors.**

S. 59. Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

Creditors' right to object:—The creditors of the company to whom any debts or claims are owing are entitled to come to the Court and object to the reduction in cases where the reduction of share capital involves (1) the diminution of liability in respect of unpaid share capital, or (2) the payment to any shareholder of any paid-up share capital, and (3) in any other case if the Court so directs. The creditors have no right to object in other cases, except under very special circumstances^(k). In cases where the application for reduction is based upon the alleged loss of capital, *prima facie* proof has to be given to the Court that the capital alleged to have been lost has in fact been lost by the company.^(l)

The Court shall settle a list of the creditors so entitled to object to the reduction, and shall for that purpose ascertain the names of those creditors and the nature and the amount of their debts and claims, and publish notices requiring creditors not entered on the list to claim to be so entered by a stated date.

59. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined

(k) Meux Brewery Co., Ltd. (1919) 1 Ch. 28.

(l) Caldwell V. Paper Makers, Ltd. (1916) W.N. 70.

Power to dis-
pense with con-
sent of credi-
tor on security
being given for
his debt.

does not consent to the reduction, the S. 60.
Court may, if it thinks fit, dispense with
the consent of that creditor, on the com-
pany securing payment of his debt or
claim by appropriating, as the Court

may direct, the following amount (that is to say),—

- (i) if the company admits the full amount
of his debt or claim, or, though not ad-
mitting it, is willing to provide for it,
then the full amount of the debt or
claim;
- (ii) if the company does not admit or is not
willing to provide for the full amount of
the debt or claim, or if the amount is
contingent or not ascertained, then an
amount fixed by the Court after the like
inquiry and adjudication as if the com-
pany were being wound up by the Court.

Power of Court to dispense with consent of creditors:—

Where a creditor entered on the list of creditors whose debt or claim has not been discharged, objects to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing the payment of his debt or claim, where the company admits the full amount of his debt or claim, or though not admitting it is willing to provide for it; and in cases where the company does not admit the debt or claim, then such an amount as may be fixed by the Court after an inquiry as if the company were being wound up by the Court.

60. The Court, if satisfied with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his
Order confirm-
ing reduction. consent to the reduction has been ob-
tained or his debt or claim has been dis-
charged or has been determined or has been secured,
may make an order confirming the reduction on such
terms and conditions as it thinks fit.

- 61. Order confirming reduction:—**The power of the Court to sanction the reduction of share capital is purely discretionary, and the Court may make the order on such terms as it thinks proper^(m). The only questions the Court has to consider, are (1) whether sanction to the proposed reduction should be refused, having regard to the interests of the public who might be induced to take shares in the company, and (2) whether the proposed reduction is fair and equitable as between all the classes of shareholders⁽ⁿ⁾. The Court has power to sanction a resolution for a partial reduction of one class of its shares, leaving the other classes unreduced. It has also power to require that the company shall alter its articles so as to make the voting power proportionate to the reduced capital^(o). It may also provide that the rights attaching to the preference shares should be extinguished and that the preference and ordinary stock resulting from the reduction of the capital should be consolidated into one consolidated stock, and ranking *pari passu* for all purposes^(p).

61. (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share shall register the order and minute.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(m) Carruth V. Imperial Chemical Industries, Ltd. (1937) 53 T.L.R. 524.

(n) Poole V. National Bank of China (1907) A.C. 229.

(o) Pinkney Steamship Co. (1892) 3 Ch. 125.

(p) Australian Estates & Mortgage Co., Ltd. (1910) 1 Ch. 414.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute. **S. 62.**

Registration of order and minute of reduction:—If the Court confirms the reduction, it approves of a minute showing, with respect to share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is divided, the value of each share and the amount deemed to be paid on each share. A copy of the order and minute are to be filed with the registrar who registers the same, and it is only on the registration of the order and minute that the resolution for reducing share capital shall take effect^(q).

Effect of registrar's certificate:—On the filing of a copy of the order and minute with the registrar, he issues a certificate, and the certificate so issued shall be conclusive evidence that all the requirements of the Act with respect to reduction of share capital have been complied with and that the share capital of the company is such as is stated in the minute. The certificate is conclusive, notwithstanding that the company has not in its articles as originally framed or by amendment, power to reduce its capital^(r).

62. (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

Minute to
form part of
memorandum

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in res-

(q) Wolf & Sons, Ltd. (1912) 57 Sol. Jou. 146.

(r) Walker & Smith, Ltd. (1903) 72 L.J. Ch. D. 572.

63. pect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

63. (1) A member of the company past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Liability of members in respect of reduced shares.

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

- (i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and
- (ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders

on the contributories settled on the list **S. 65.**
as if they were ordinary contributories
in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

Liability of members after reduction:—When once the reduction of share capital is complete, the liability of a member past or present, is the difference if any, between the amount paid or (as the case may be) the reduced amount if any, which is deemed to have been paid on the share, and the amount of the share as fixed by the minute. But if any creditor by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, is not entered on the list of creditors, then the Court may settle a list of all persons who were members of the company at the date of the registration of the order for reduction and minute, and make and enforce calls and orders on the persons so settled, as if they were contributories in a winding-up, for the payment of debts of the creditor.

64. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

Penalty on concealment of name of creditor.

65. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit the causes which led to the reduction.

Publication of reasons for reduction.

- 66A.** **66.** A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

Variation of Shareholders' Rights

- 66A.** (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

Rights of holders of special classes of shares.

- (2) An application under this section must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after **S. 66A.** hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly.

Variation of shareholders' rights:—This section has been inserted by the Amendment Act of 1936, and entitles a minority of the shareholders who object to the variation of their rights to apply to the Court under certain circumstances.

Where rights are unconditionally given by the memorandum, such rights cannot be altered or infringed^(s). But if the memorandum itself reserves the right to alter them or if it provides that the rights are subject to modification under a power given by the articles, the rights attached to the different classes may be interfered with^(t).

Under this section the holders of not less in the aggregate than one-tenth of the issued capital of the class who do not vote in favour of the resolution varying the rights attached to any class of shares may apply to the Court within fourteen days of the passing of the resolution, and if the Court finds

(s) *Ashbury V. Watson* (1885) 30 Ch. D. 376.

(t) *British India Corporation V. Shanti Narain* (1935) 57 All. 810.

- S. 67. that the variation would unfairly prejudice the shareholders of that class represented by the applicant, the Court may in its discretion disallow the variation.

Exercise of power:—The power conferred on a majority to bind a minority of shareholders must be exercised *bona fide* and the Court will interfere to prevent oppression or unfairness^(u). It must be exercised subject to a general principle which is applicable to all authorities conferred on majorities enabling them to bind minorities, viz., that the power given must be exercised for the purpose of benefitting the class as a whole, and not for the individual members only. It is therefore competent for a company to carry its profits to a reserve fund instead of dividing them, and to invest them in a manner which, although not *ultra vires*, is objectionable^(v). A company has power by altering its articles to provide for the cancellation of all the arrears of cumulative preference dividend which has accrued on the preference shares, and to substitute a non-cumulative dividend^(w). But a modification of rights will not be sanctioned by the Court where the interest of a particular class of shareholders is not taken as the dominant consideration^(x).

Registration of Unlimited Company as Limited

67. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of

Registration
of unlimited
company as
limited.

(u) *Goodfellow V. Nelson Line, Ltd.* (1912) 2 Ch. 324.

(v) *Burland V. Earle* (1902) A.C. 83.

(w) *Last V. Buller & Co., Ltd.* (1909) 36 T.L.R. 35.

(x) *British American Nickel Corporation, Ltd. V. M. J. O'Brein* (1927) A.C.

this Act in the case of a company registered in pursuance of that Part, **S. 68.**

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

Registration of unlimited company:—Unlimited companies are generally not formed, for there is no advantage in forming them. The name of an unlimited company cannot include the word "limited" as part of its name. Under this section, an unlimited company may register itself as a limited company, and take the benefit of limited liability. But the liability already incurred upto the date of the registration has to be borne by the members to the full extent. It is only after the date of registration that the members are entitled to the benefit of limited liability^(y).

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

Power of unlimited company to provide for reserve share capital on re-registration.

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;

(b) provide that a specified portion of its uncalled share capital shall not be capable

(y) *Garnett Mining Co. v. Sutton* (1865) 34 L.J.Q.B. 118.

S. 69. of being called up except in the event and for the purposes of the company being wound up.

Power to reserve capital:—An unlimited company having a share capital at the time of passing a resolution for registration as a limited company, may do one or more of the following things, viz:

(a) Increase the nominal capital, by increasing the face value of its share, and reserve the amount of the increased capital for the purposes of the company being wound up. For example, if the face value of the share is Rs. 100, on which Rs. 50 have been paid, a company may increase the face value of the share to Rs. 200, and reserve the new Rs. 100, to be called up only in the event and for the purposes of the company being wound up.

(b) Provide that a specified portion of its uncalled capital shall not be capable of being called up, except for the purposes of winding up. For example, if the face value of each share is Rs. 100 on which a sum of Rs. 50 has been paid, the company may reserve a part of the uncalled capital, say, a sum of Rs. 25 to be called only in the event and for the purposes of the company being wound up.

Reserve Liability of Limited Company.

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Reserve liability of limited company.

Reserve liability of limited company:—Under this section, a company may by a special resolution determine, that a portion of its uncalled share capital shall not be capable of being called up, except in the event, and for the purposes of the company being wound up. When such a resolution has been

passed, the particular portion of the share capital provides an additional fund for the payment of the debts of the company. A company has no power to create any charge on that portion of its capital which in accordance with the passing of a resolution under this section could only be called up in the event and for the purposes of winding up^(z). Where a portion of the uncalled capital has been reserved, it is not open to a company to alter the articles so as to make the reserve liability available to the company at any time^(a). The contract of the shareholder, as regards such reserve capital is that the business of the company shall be carried on with a certain amount of capital of which he is to contribute a fixed proportion, and on the faith of the credit attaching to his liability to contribute a further proportion in the event of a winding-up^(b).

Unlimited Liability of Directors.

70. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

Limited company may have directors with unlimited liability.

(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts that office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the

(z) *Bartlett V. Mayfair Property Co.* (1898) 2 Ch. 28.

(a) *Malleon V. National Insurance & Guarantee Corporation* (1893) 1 Ch. D. 703.

(b) *Midland Railway Carriage & Waggon Co.* (1907) 23 T.L.R. 661.

S. 72. default, but the liability of the person elected or appointed shall not be affected by the default.

71. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

Special resolution of limited company making liability of directors unlimited.

(2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum.

PART IV.

MANAGEMENT AND ADMINISTRATION

Office and Name

72. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier have a registered office to which all communications and notices may be addressed.

Registered office of company.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.

Registered office of the company:—This section has been materially amended by the Amendment Act of 1936,

and requires that every company shall have a registered office **S. 73.** as from the day on which it begins to carry on business, or as from the 28th day after its incorporation, whichever is earlier.

The memorandum of association states the province in which the registered office of the company is situate. This registered office may be transferred from one province to another by passing a special resolution and getting the same confirmed by an order of the Court under section 12. But the confirmation of the Court is not necessary in a case in which an alteration is sought to be made in the situation of its registered office from one town to another in the same province. This can be done by sub-section (2) by giving a notice to the registrar within twenty-eight days after any such change.

The province in which the registered office of the company is situate is important for the purpose of determining the domicile of the company. For, under section 3 it is only the High Court within whose jurisdiction the registered office of the company is situate that has power to entertain a petition to wind up the company^(c). A company registered in a foreign country can acquire domicile in British India by carrying on business even temporarily within the jurisdiction of some Court in British India^(d). All communications and notices may be addressed to the company at the place where its registered office is situate.

Where a company carries on business without complying with the requirements of this section, it becomes liable to a fine not exceeding Rs. 50 for every day during which it so carries on business.

73. Every limited company—

- (a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local

Publication of
name by a limited
company.

(c) Aryya Insurance Co., Ltd. (1936) 63 Cal. 773.

(d) New York Life Assurance Co., Ltd. V. Public Trustee (1924) 2 Ch. 101.

§. 74.

- limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place;
- (b) shall have its name engraven in legible characters on its seal;
 - (c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundies, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

Publication of name:—This section requires that the company shall keep painted or affixed on the outside of its office in which its business is carried on, its name in a conspicuous position ; its name must be engraved in legible character on its seal, and must be mentioned in all notices, advertisements and other official publications of the company, and on all bills of exchange, promissory notes, hundis, cheques, orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

74. (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

Penalties for non-publication of name.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any

seal purporting to be a seal of the company whereon **S. 75.** its name is not engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Penalties for non-publication of name:—If a company does not publish its name in the manner required by section 73, the company and every officer who knowingly and wilfully authorises the default, shall be liable to a fine not exceeding Rs. 50 for every day the default continues. Further, every officer of the company who is a party to the non-compliance with the provisions of this section is personally liable on any such bill, note, cheque etc., unless the same is duly paid by the company. If the name of the company as inserted in the bill is not the correct name of the company, it cannot render the company liable, but the directors who drew such bill are personally liable^(e). But it is a sufficient compliance with the law if the company's name is correctly stated in the address, without being also stated in the acceptance^(f).

75. (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally

Publication of authorised as well as subscribed and paid-up capital.

(e) Nassan Steam Press V. Tyler (1894) 70 L.T. 376.

(f) F. Staey & Co., Ltd. V. Wallie (1912) 28 T.L.R. 209.

S. 76. conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

Publication of nominal capital:—This section provides that whenever a company issues any notice or other publication containing a statement of the amount of the authorised capital, there should also be published in an equally prominent position and in equally conspicuous characters, a statement as to the amount of the capital which has been subscribed as well as the amount of the capital which has been paid up. If the provisions of the section are contravened the company and every officer who is knowingly a party to the default shall be liable to a fine not exceeding Rs. 1,000.

Meetings and Proceedings.

76. (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

Annual general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

Annual general meeting:—This section as amended, now requires every company to hold a general meeting of its

members within eighteen months from the date of its incorporation, and thereafter once at least in every calendar year and within a period of fifteen months from the date of the last preceding meeting. A "calendar year" means the period of time commencing on the 1st January and ending on the 31st December and not the period of twelve months commencing from the day of registration of the company^(g). The default is made when the company fails to hold its meeting within that portion of the next current year which is within fifteen months after the date of the last preceding meeting^(h). The holding of an extraordinary meeting on the requisition of shareholders, on default by the directors in convening a general meeting, does not operate as a general meeting within the meaning of this section⁽ⁱ⁾.

Who may call meetings:—It is only the directors meeting as a board that has power to call meetings and the secretary cannot, on his own responsibility lawfully summon a meeting^(j). But though the secretary has no authority to convene a meeting without the authority of the directors, the members could ratify it so as to make it valid^(k). Under the new section 79 (2) cl. (a) two or more members holding not less than one-tenth of the share capital paid or if the company has no share capital, not less than five per cent. in number of the members may convene a meeting.

Powers of Court :—As a general rule the Court is reluctant to interfere in the internal affairs of a company^(l). "It is the act of all which is the act of majority provided all are consulted, and the majority are acting *bonafide*, meeting not for the purpose of negating what any one may have to offer, but for the purpose of negating what when they are met together, they may after due consideration, think proper to negative. For the majority to say : we will not care what one partner may say, we being in the majority will do what we please, is what the Court will not allow"^(m). If all the

(g) Gibson V. Barton (1875) L.R. 10 Q.B. 329.

(h) Smedley V. Registrar of Coys. (1919) 1 K.B. 97.

(i) Emperor V. Nasurbhai Abdullabhai Lalji (1923) 25 Bom. L.R. 224.

(j) State of Wyoming Syndicate (1901) 2 Ch. 43.

(k) Knight V. Williams (1901) 83 L.T. 729.

(l) Foss V. Harbottle (1843) 2 Hare 461.

(m) Const V. Harris (1824) T. & R. 525 per Lord Eldon.

S. 77. members assent to a transaction, that is *intra vires* the company, though *ultra vires* the board of directors, it is not necessary that they should hold a meeting in one room or one place to express their assent simultaneously⁽ⁿ⁾. Ordinarily the Court should incline more in favour of the validity of proceedings than in favour of their invalidity^(o); it is only if an act *ultra vires* or fraudulent is sought to be committed or if the rights of the members are infringed or a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of a private partnership, it is rule of the Court to interfere and it will do so^(p).

77. (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so

(n) *Parker & Cooper, Ltd. v. Reading* (1926) 1 Ch. 975; *Empress Express Engineering Works, Ltd.* (1920) 1 Ch. 466.

(o) *Shamdasani v. Tata Industrial Bank, Ltd.* (1924) 26 Bom. L.R. 987; *Bhajekar v. Shinkar* (1934) 36 Bom. L.R. 483.

(p) *Featherstone v. Cooke* (1873) L.R. 16 Eq. 298.

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- paid up, and in either case the consideration for which they have been allotted,
- (b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;
 - (c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares;
 - (d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation;
 - (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification;
 - (f) the extent to which underwriting contracts if any, have been carried out;
 - (g) the arrears, if any, due on calls from directors, managing agents and managers; and
 - (h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to

s. 77.

any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company a director thereof.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The directors shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory

report or in holding the statutory meeting, the Court **S. 77.** may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company.

Statutory meeting of company:—Every company limited by shares, and every company limited by guarantee having a share capital must, after a period of one month and before the expiration of a period of six months from the date on which it is entitled to commence business, hold a general meeting of the members which shall be called the statutory meeting. The object of convening a statutory meeting is to put shareholders as early as possible, in possession of important matters relating to the company. The notice convening the meeting must state on the face of it, that the meeting is to be the statutory meeting^(q). Before the statutory meeting is convened, the directors shall, at least twenty-one days before the day on which the meeting is held, forward a copy of the statutory report to every member of the company. The statutory report certified by not less than two directors shall contain the particulars specified in clauses (a) to (h) of subsection (3) and a copy of the same shall be filed with the registrar forthwith after the sending thereof to the members of the company.

If default is made in holding the statutory meeting or in filing the statutory report with the registrar, the company and its directors who knowingly and wilfully authorise the default shall be liable to a fine not exceeding Rs. 500. A default under this section furnishes a ground for an application under section 162 for the winding-up of the company. But,

(q) *Gardener V. Iredale* (1912) 1 Ch. 700.

S. 78. the Court may in the exercise of its discretion direct a statutory meeting to be called and the statutory report to be filed.

78. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

Calling of extraordinary general meeting on requisition.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

(4) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.

Extraordinary general meeting:—This section gives to the members a right to make a requisition on the directors of the company, for the holding of an extraordinary general

meeting. The requisition is not valid unless it is signed by **S. 79.** holders of not less than one-tenth of the issued share capital upon which all calls then due have been paid^(r).

The requisition must state the objects of the meeting, must be signed by the requisitionists and deposited at the registered office of the company. The directors on receipt of the requisition must call the meeting, but if the meeting is not called within twenty-one days of the deposit of the requisition, the requisitionists may themselves call the meeting. In any event, this meeting must be called within three months from the date of the deposit of the requisition. But the Court will not order the directors to summon a meeting for the general purposes of the company, when under this section the shareholders themselves are competent to convene a meeting^(s).

79. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat notwithstanding any provision made in the articles of the company in this behalf:—

Provisions as
to meetings
and votes.

- (a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit;
- (b) Notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression 'Table A' means

(r) *Oriental Navigation Ltd. v. Bhanaram Agarwalla* (1921) 49 Cal. 399.

(s) *MacDongall v. Gardiner* (1875) L.R. 10 Ch. App. 606.

S. 79.

that table as for the time being in force; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting;

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll: Provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll;

(d) an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles; and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf:—

(a) two or more members holding not less than one-tenth of the total share capital paid-up or, if the company has not a share capital, not less than five per cent. in number of the members of the company may call a meeting;

(b) in the case of a private company two members and in the case of any other

company five members personally present shall be a quorum; **S. 79.**

- (c) any member elected by the members present at a meeting may be chairman thereof;
- (d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote;
- (e) on a poll votes may be given either personally or by proxy;
- (f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation, either under seal or under the hand of an officer or an attorney duly authorised; and
- (g) a proxy must be a member of the company;

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.

Provisions as to meetings:—This section replaces the old section 79, and lays down provisions contained in sub-section

S. 79. (1) which are applicable to all public companies, notwithstanding anything contained in the articles.

Sub-section 1: Cls. (a) & (b): Notice:—A meeting other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing. This means a period of not less than fourteen days exclusive of the day of service of the notice and also exclusive of the day on which the meeting is to be held^(t). The notice of the meeting with a statement of the particular business to be transacted shall be served on every member in the manner in which the notices are required to be served. But if a member has no address, and no address for notices in British India is given, it is not necessary in order to render the meeting valid to serve the particular member, and the fact that he was not served does not invalidate the resolution passed at that meeting^(u).

Cls. (c) and (d) : Poll:—Five members present in person or by proxy or the chairman of the meeting or any member or members holding not less than one-tenth of the issued capital which carries voting right, shall be entitled to demand a poll. The chairman may direct the manner in which the poll is to be taken, but that does not entitle him to enlarge the power^(u1). If a poll demanded by a majority of shareholders is refused, the Court will grant an interim injunction prohibiting the carrying out of the resolution so challenged^(u2).

Sub-section 2 : Quorum :—The provisions of this sub-section apply only where the articles of the company do not make any other provision in that behalf. In the case of a private company two members, and in the case of a public company five members, personally present shall be a quorum. Where the articles provide that if the quorum is not present the meeting may be adjourned and at the adjourned meeting the members present shall form a quorum, this does not apply to a meeting of a special class of shareholders^(u3).

(t) *Hector Whaling Co. Ltd.* (1936) 1 Ch. 208.

(u) *Dickson V. Halesowen Steel Co.* (1928) W.N. 33.

(u1) *Haven Gold Mining Co.* (1882) 20 Ch. D. 151.

(u2) *Cory V. Reindeer Steamship Co.* (1915) 31 T.L.R. 530.

Hemans V. Hotchkiss Ordnance Co. (1899) 1 Ch. 115.

Right to vote:—Every member shall be entitled to one **S. 79.** vote in respect of each share or each one hundred rupees of stock held by him. When a poll is demanded, votes may be given either in person or by a proxy. The registered holder of fully paid-up shares who becomes insolvent is entitled to vote, so long as his name is on the register. Where the shares are transferred and registered in the name of a mortgagee, he is entitled to vote, though it must be exercised in accordance with the wishes of the mortgagor, if there is an agreement between them to that effect^(u4). But the purchaser of forfeited shares is not entitled to vote, whilst any calls or other sums remain due and payable to the company from the original holder of the shares^(u5).

Chairman and his duties:—The articles generally specify the person who is to act as the chairman at a meeting. If there is no such provision, any member elected by the members present may be the chairman thereof. It is the duty of the chairman to preserve order, conduct meetings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it, but he has no power to stop or adjourn a meeting at his own will and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for the object^(u6). Where the articles provide that the chairman may with the consent of the members present at any meeting adjourn the same, the chairman is not bound to adjourn a meeting, even though a majority of those present desire an adjournment^(u7). And the decision of the chairman *bonafide* given is conclusive^(u8). He has *prima facie* authority to decide all incidental questions which arise at such meeting and necessarily require decision at the time^(u9). It is competent to the chairman with the sanction of a vote of the meeting to declare the discussion closed, and to put the question to the vote^(u10).

(u4) *Puddephatt v. Leith* (1916) 1 Ch. 200.

(u5) *Randt Gold Mining Co. v. Wainwright* (1901) 1 Ch. 184.

(u6) *National Dwellings Society v. Sykes* (1894) 3 Ch. D. 159.

(u7) *Salisbury Gold Mining Co. v. Hathorn* (1897) A.C. 269.

(u8) *Wall v. Exchange Investment Corporation Ltd.* (1926) 1 Ch. 143.

(u9) *Indian Zoedone Co.* (1884) 26 Ch. D. 70.

(u10) *Wall v. Exchange Investment Corporation Ltd.* (1926) 1 Ch. 143.

S. 79. Apart from fraud, the declaration of the chairman that a resolution has been passed is conclusive^(u11). But the declaration is not conclusive where the declaration on the face of it shows that the statutory majority has not voted in favour of the resolution^(u12).

Minutes prima facie evidence:—The entry by the chairman in the minute book of the result of a poll or of his decision of all such questions, although not conclusive, is *prima facie* evidence of the result or of the correctness of that decision. The onus of displacing that evidence is thrown on those who impeach the entry^(u13). However the Court is entitled to look at the notice convening the meeting as part of the *res gestæ* to see if the proceedings are regular^(u14). But the minutes of a meeting are not exclusive evidence of what takes place at the meeting. An unrecorded resolution may be proved *aliunde*^(u15). In the absence of contrary evidence showing the incorrectness of the minutes, they must be taken as true^(u16).

Proxy:—There is no common law right to vote by proxy. A shareholder in a limited company can vote by proxy only if and so far as the articles of the company so provide^(u17). A personal right to vote is not taken away by the giving of a proxy, and a shareholder can attend and vote according to his volition and the proxy has no right to prevent it^(u18). A proxy can be given only to a member of the company, but for the purposes of a meeting of any particular class of persons, proxies can only be given to and held by members of that class^(u19).

The instrument of proxy shall be in writing under the hand of the appointor or his agent authorised in writing in that behalf. It may be according to the form laid down in clause 67 of Table A. A proxy cannot himself be the attesting witness to the instrument of proxy. If a proxy is properly stamped at execution, its operative part, viz. the

(u11) *Hadleigh Castle Gold Mines Ltd.* (1900) 2 Ch. 419.

(u12) *Caratal New Mines Ltd.* (1902) 2 Ch. 498.

(u13) *Indian Zoedone Co.* (1884), 26 Ch. D. 70.

(u14) *Betts & Co. Ltd. V. Macnaghten* (1910) 1 Ch. 430.

(u15) *Betts & Co. Ltd. V. Macnaghten* (1900) 1 Ch. 430.

(u16) *Shamdasani V. Tata Industrial Bank Ltd.* (1924) 26 Bom. L.R. 987.

(u17) *McLaren V. Thompson* (1917) 2 Ch. 261.

(u18) *Cousins V. International Brick Co.* (1931) 2 Ch. 90.

(u19) *Central Bahia Rly. Co.* (1902) 18 T.L.R. 502.

name of the proxy and the date of the meeting at which the proxy is to be used may be filled in afterwards by any person properly authorised to do so^(u20). **S. 80.**

Where the articles provide that the proxies should be deposited at the registered office of the company two clear days before the day of the meeting, proxies lodged after the date of an original meeting but more than two days before the date for an adjourned meeting, cannot be used for the purpose of voting at the adjourned meeting^(u21).

Where the article provides that a proxy shall be valid notwithstanding the revocation or the death of the shareholder unless notice of the revocation is received by the company before the meeting, a revocation after the meeting even though before the poll is taken, is of no avail^(u22).

Sub-section (2):—If for any reason it is impracticable to call a meeting of the company in any manner in which the meeting may be called, application may be made to the Court and the Court may direct a meeting to be called, held and conducted in such manner as the Court thinks fit^(v). But this section is not intended to enable the Court to make an order which will excuse persons responsible for failure to call a general meeting from the consequences of their omission^(w).

80. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

Representation of companies at meetings of other companies of which they are members.

Representation of company at meetings:—A company may become a shareholder in another company, if so authorised by its memorandum and articles^(x). Since a company

(u20) *Sadgrove V. Bryden* (1907) 1 Ch. 318.

(u21) *McLaren V. Thompson*. (1917) 2 Ch. 261.

(u22) *Spiller V. Maya Development Co.* (1926) W.N. 78.

(v) *Sailing Ship Kentmere Co.* (1897) W.N. 58.

(w) *Brahimen Baria Loan Co. Ltd.* (1934) 61 Cal. 408.

(x) *Barnett's Banking Co.* (1867) 3 Ch. App. 105.

S. 81. is merely a creature of the law having no physical existence, this section provides that in cases where one company is a member of another company, the directors may, by a resolution authorise any of its officials or any other person to act as its representative at meetings of that other company. But where an article provides that a proxy given by the company should be executed under its common seal, this applies only to corporations having a common seal and not to corporations not having a common seal^(y).

81. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given:

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which not less than twenty-one days' notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll may be demanded.

(y) Colonial Gold Reefs Ltd. V.

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct; it may, if the chairman so directs, be taken at the meeting at which it is demanded. **S. 81.**

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company, or under this Act.

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, or under this Act.

Resolutions:—The resolutions which may be submitted to a general meeting of a company are of three kinds, viz. (1) ordinary, (2) extraordinary, and (3) special.

Ordinary resolution:—An ordinary resolution is one which is sufficient to transact any ordinary business of the company, which does not require to be effected in any other manner either by this Act, the memorandum or the articles. It must be passed at a meeting of the company, of which fourteen clear days' notice in writing has been given. It is passed generally on a show of hands, or if a poll is duly demanded, by a simple numerical majority of the votes given at the meetings, whether in person or by proxy, where proxies are allowed by the articles of the company. Where special business is to be transacted at an ordinary general meeting the notice should specify the general nature of such special business^(z).

Extraordinary resolution:—A resolution is an extraordinary resolution where it has been passed by a majority of not less than three-fourths of such members entitled to vote, as are present in person or by proxy where proxies are allowed, at a general meeting of which fourteen clear days' notice has been given, that it is intended to propose the re-

(z) Belts & Co. V. MacNaghten (1910) 1 Ch. 430.

S. 81. solution as an extraordinary resolution. The shareholder must have notice of the subjects proposed to be considered at the meeting, in order to determine whether in his own interest, he shall attend the meeting or not. Thus, where it is intended to increase or sanction the increase of the share capital, it is not sufficient, if the notice merely refers generally to a proposed resolution to increase the share capital; the notice must show an intention to make the specific increase embodied in the resolution^(a).

Special resolution:—A resolution shall be a special resolution when

- (1) it has been passed by such a majority as is required for the passing of an extraordinary resolution,
- (2) at a general meeting, and
- (3) not less than twenty-one days' notice has been given specifying the intention to propose the resolution as a special resolution.

The notice must give a sufficiently full and frank disclosure of the business to be transacted. A resolution therefore, obtained by means of a notice which did not put the shareholders in a position to know what they were voting for, cannot be supported and is not valid^(b).

The definition of "special resolution" which was contained in the old sub-section (2), has been replaced by the present sub-section (2) by the Amendment Act of 1936. By virtue of this change, it is now no longer necessary that a special resolution should be confirmed by a second general meeting.

Sub-section (3) provides that at any meeting at which an extraordinary or special resolution is submitted to be passed, a declaration of the chairman on the show of hands, that the resolution is carried shall, unless a poll be demanded, be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the proposition. In such a case, it is not open to any member to show by evidence that the resolution was not so carried^(c).

(a) *McConnell V. Prill & Co.* (1916) 2 Ch. 57.

(b) *Baillie V. Oriental Telephone & Electric Co. Ltd.* (1915) 1 Ch. 503.

(c) *Sassoon United Mills* (1928) 30 Bom. L. R. 598.

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from the passing thereof be printed or typewritten and duly certified under the signature of an officer of the company and filed with the registrar who shall record the same. **S. 83.**

Registration and copies of special and extraordinary resolutions.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

Minutes of proceedings of general meetings and of its directors.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings

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(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

Minutes of proceedings of general meetings and of its directors.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings

S. 83. were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(5) Any member shall at any time after seven days from the meeting be entitled to be furnished with in seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.

(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine to twenty-five rupees for every day during which the default continues.

(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.

*Directors***S. 83A.**

83A. (1) Every company shall have at least three directors.

Directors obligatory.

(2) This section shall not apply to a private company except a private company being a subsidiary company of a public company.

Directors:—This and the next section were added by Act XI of 1914 and both were subsequently amended by the Amendment Act of 1936.

This section enacts that every public company and every company which is a subsidiary of a public company must have at least three directors. It is not obligatory, therefore, upon a private company to have any director at all.

Position of directors:—It is difficult to state exactly the legal position of directors. Sometimes they are called trustees, and sometimes agents of the company. This two-fold character is ably set forth by Lord Selborne in *Great Eastern Railway Company v. Turner*, "The directors are the mere trustees or agents of the company—trustees of the company's moneys and property—agents in the transactions which they enter into on behalf of the company^(d)." Directors are described as trustees, agents or managing partners, not as exhausting their powers or responsibilities, but as indicating useful points of view. It does not matter much what you call them, so long as you understand what their true position is, which is that they are commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it^(e).

Directors as agents:—Directors are agents for the purpose of entering into contracts on behalf of the company. The company itself cannot act in its own person for it has no person; it can only act through the directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable, those directors will be liable; where the liability would attach to

(1872) L.R. 8 Ch. 149.

Forest of Dean Coal Mining Co. (1878) 10 Ch. D. 453 per Jessel M.R.

S. 83A. the principal, and the principal only, the liability is the liability of the company^(f).

It therefore follows:

(1) That where the directors enter into a contract on behalf of a company, they are not personally liable thereon unless they have taken upon themselves a personal liability^(g).

(2) Where the directors enter into a contract in their own name but on behalf of the company, the other party may, on discovering that the company is the real principal, sue the company on the contract^(h).

(3) Where the directors have entered into a contract on behalf of a company, which contract is *ultra vires* the directors, but *intra vires* the company, the company may in general meeting ratify the contract⁽ⁱ⁾. But the directors may be held liable as on a breach of warranty of authority^(j).

(4) Where the directors enter into a contract on behalf of the company, which is *ultra vires* the company, the company is not liable on such contracts, nor can the company in general meeting ratify such a contract^(j1). In such cases, the directors also, cannot be made liable on the contract, because they have acted as agents for an existing principal.

(5) The directors like agents cannot make any profits without the knowledge and consent of the principal during the course of the agency in the business of the agency^(k).

Directors as trustees:—It has sometimes been said that the directors are trustees. If this means no more than that the directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true. But if the statement is meant to be an indication by way of analogy of what those duties are, it is wholly misleading. There is little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement^(l).

(f) *Ferguson v. Wilson* (1866) 2 Ch. App. 77.

(g) *Stacey & Co. Ltd. v. Wallis* (1905) 28 T.L.R. 209..

(h) *Gardiner v. Heading* (1928) 2 K.B. 284.

(i) *Grant v. United Kingdom Switchback Rly. Co.* (1888) 40 Ch. D. 135.

(j) *Collen v. Wright* (1857) 8 E. & B. 647.

(j1) *Ashbury Rly. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653.

(k) *Parker v. MacKenna* (1874) L.R. 10 Ch. App. 96.

(l) *City Equitable Fire Insurance Co.* (1925) 1 Ch. 407.

Again where a shareholder files a suit against the company and its directors, treating the directors as his trustees, seeking redress against them for a breach of trust, there the directors being in the position of trustees, are of course liable^(m). **S. 83A.**

Although the directors are not strictly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands, or which is actually under their control, and ever since joint stock companies were invented, directors have been held liable to make good moneys which they have misappropriated, upon the same footing as if they were trustees⁽ⁿ⁾. But the directors are the trustees for the company, they are not trustees for the creditors, nor for individual shareholders. They may therefore, purchase shares without disclosing pending negotiations for the sale of the company's undertaking^(o).

The following are some of the instances in which directors have been held liable as trustees:—

(1) Jointly and severally, where they had misappropriated funds of the company^(p).

(2) of the power of making calls. Thus, where the directors made a call but paid nothing on their own shares, they were held to have committed a breach of trust and were ordered to pay to the company the amount of the calls on their shares^(q).

(3) of the power of issuing and allotment of shares^(r).

(4) of the power of forfeiting shares^(s).

(5) In respect of the contracts they entered into, on behalf of the company. The directors have been held liable as trustees when they had obtained the benefit of a contract which they had entered into in their own name to the exclusion of the company^(t).

(6) of the power of approving transfers of shares^(u).

(m) *Ferguson v. Wilson* (1866) 2 Ch. App. 77.

(n) *Lands Allotment Co.* (1894) 1 Ch. 616.

(o) *Percival v. Wright* (1902) 2 Ch. 421.

(p) *Joint Stock Discount Co. v. Brown* (1869) 8 Eq. 381.

(q) *Alexander v. Automatic Telephone Co.* (1900) 2 Ch. 56.

(r) *Fraser v. Whalley* (1864) 2 H. & M. 10.

(s) *Harris v. The North Devon Rly. Co.* (1855) 20 Beav. 384.

(t) *Cook v. Deeks* (1916) 1 A.C. 555.

(u) *New Great Eastern Spinning & Weaving Co.* (1899) 23 Bom. 685.

S. 83A. (7) of the power of employing the funds of the company^(v).

(8) of the power of receiving the payment of calls^(w).

Liability of directors:—As directors are agents of the company in respect of the transactions they enter into, their liability may best be considered under five distinctive heads, viz. (1) as to contracts, (2) as to frauds and other torts, (3) in respect of their negligence, (4) in respect of crimes, (5) as to the application of the company's funds.

(1) **As to contracts:**—The general rule regarding the liability of directors was laid down by Lord Cairn in *Ferguson V. Wilson*^(x), in language which has almost become classical. "Whenever an agent is liable those directors will be liable. Where the liability would attach to the principal, and the principal only, the liability is the liability of the company. The company itself cannot act in its own person, for it has no person, it can only act through directors, and the case is, as regards those directors merely the ordinary case of principal and agent". If therefore, the directors have authority to enter into a contract on behalf of the company, the company alone would be held liable. Where on the other hand, the directors enter into a contract *ultra vires* the company, neither the company is liable, nor could the directors be held personally liable, as they have merely acted as agents for a known principal^(y). But if the contract is *intra vires* the company, but *ultra vires* the directors^(z), the directors will be held liable as on a breach of warranty of authority. The company may however ratify such a contract and render itself liable^(a).

(2) **As to frauds and other torts:**—In the domain of torts, the general principle is that he who commits a tort is himself personally liable^(b). A company may also be held liable for the commission of any tort, for it is in fact the directors who set the company in motion^(c).

(v) *Remembrancer of Local Affairs V. Guha* (1935) 40 C.W.N. 1341.

(w) *European Central Rail Co.* (1872) L.R. 13 Eq. 255.

(x) (1866) 2 Ch. App. 77 at 89.

(y) *Ashbury Rly. Carriage & Iron Coy. V. Riche* (1875) L.R. 7 H.L. 653

(z) *Collen V. Wright* (1875) 8 E. & B. 647.

(a) *Grant V. United Kingdom etc. Coy.* (1888) 40 Ch. D. 135.

(b) *Cullen V. Thompson Trustees* (1862) 4 Mac. 424.

(c) *Cornford V. Carlton Bank* (1899) 1 Q.B. 372.

The directors as such are not responsible for the tortious acts of the company unless such acts have been expressly directed by them^(d). But a director cannot be held liable in respect of the frauds and other torts committed by a co-director, unless he has expressly or impliedly authorised them. For to do so would make his position intolerable^(e).

(3) **Negligence:**—Directors are bound to use fair and reasonable diligence in the discharge of their duties towards the company^(f). If directors act within their powers, if they act with such care as is reasonably to be expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. The amount of care to be taken is difficult to define, but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care, they might have avoided them. It is sufficient if they have acted with such care as may reasonably be expected of persons in a similar position; in other words, they are not liable for mere errors of judgment^(g). Mere omission to attend the meetings of a company is not the same thing as neglect or omission of duties which ought to have been performed at the meetings^(h). To render a director personally liable for allowing decrees to be time-barred, the onus is on the company to show that the decretal amounts could have been recovered from the judgment debtors, and that the failure to do this was due to the negligence of the director⁽ⁱ⁾. Their negligence must not be the omission to take all possible care, it must be much more blamable than that, it must be in a business sense culpable or gross^(j). In *Dovey V. Cory*^(k), a bank had sustained heavy losses by the issue of fraudulent balance sheets and the improper advances of money to customers of the bank. The frauds were the work of the

(d) *Solloway V. Johnson* (1934) A.C. 193.

(e) *Land Credit Coy. of Ireland V. Fermoy* (1870) L.R. 5 Ch. App. 763.

(f) *Forest of Dean Coal Mining Co.* (1874) 10 Ch. D. 450.

(g) *Lagunas Nitrate Co. V. Lagunas Silver Syndicate* (1870) L.R. 5 Ch. App. 763.

(h) *Marquis of Bute's Case* (1892) 2 Ch. 100.

(i) *Guntur Cotton etc. Co. V. Venkatachalapati* (1932) 35 Bom. L.R. 107.

(j) *Lagunas Nitrate Co. V. Lagunas Silver Syndicate* (1870) L.R. 5 Ch. App. 763..

(k) (1901) A.C. 477.

S. 83A. manager and the chairman. A director who had no complicity in the frauds was held not liable merely because he had relied on subordinates doing their duty. Section 281 of the Act now provides that if in any proceeding for negligence, default, breach of duty or breach of trust, it appears to the Court that, that person is or may be liable but that he has acted honestly and reasonably and that having regard to all the circumstances of the case, he ought fairly to be excused for the negligence etc. the Court may relieve him, either wholly or in part from his liabilities, on such terms as the Court may think fit. But if the director acts in bad faith or is guilty of gross negligence, he is not entitled to the protection afforded by this section⁽¹⁾.

(4) As to crimes:—In addition to specific penalties enacted by particular sections of this Act for breaches of duties, sections 236, 238A, 282, and 282A lay down heavy punishments for offences committed by directors in relation to the company, its books or property. Even in winding-up proceedings, the Court may, on the application of any person interested, sanction the prosecution of delinquent directors.

(5) Application of company's money:—Directors are liable for application of the company's money for purposes which are *ultra vires* the company, independently of any proof of fraud or negligence on their part. The fact that they have acted *bona fide* does not affect their liability to replace the money^(m). Directors cannot make presents to themselves out of the funds of the company, unless authorised so to do by the instruments which regulate the company, or by the shareholders at a properly convened meeting⁽ⁿ⁾. They are bound to repay to the company with interest any remuneration taken by them in excess of what is prescribed by the articles or the resolution of the company^(o). This duty of replacing the money arises even in cases where the directors have honestly misinterpreted their powers under an ambiguous memorandum^(p).

(1) Govind V. Rangnath (1930) 54 Bom. 226.

(m) Cullerne V. London etc. Bld. Society (1890) 25 Q.B.D. 485.

(n) George Newman & Co. (1895) 1 Ch. 674.

(o) Burland V. Earle (1902) A.C. 590.

(p) London Financial Association V. Kelk (1884) 26 Ch. D. 107,

Powers of directors:—The articles generally give to the directors a number of specified powers, but there is always to be found in the articles of a company a general clause similar to the clause 71 of Table A. S. 83A.

Duties of directors:—In determining the question of the liability of directors, Romer J. enunciated and adopted the following principles relative to the duties of directors:—

“The manner in which the work of a company is to be distributed between the board of directors and the staff is a business matter to be decided on business lines. The larger the business carried on by the company, the more numerous and more important the matters that must of necessity be left to the managers, the accountants and the rest of the staff.”

“In ascertaining duties of a director of a company, it is necessary to consider the nature of the company's business and the manner in which the work of the company is reasonably in the circumstances and consistently with the articles of association, distributed between the directors and the other officials of the company.”

“In discharging those duties, a director (a) must act honestly and (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf. But, (c) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings, and of meetings of any committee, to which he is appointed, and though not bound to attend all such meetings, he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds

S. 83B. of suspicion, justified in trusting that official to perform such duties honestly."

"It is the duty of each director to see that the company's monies are from time to time invested in a proper state of investment, except so far as the articles of Association justify him in delegating that duty to others."

"It is not the duty of a director of a big insurance company to supervise personally the safe custody of the securities of the company. It would be impracticable, on every purchase of securities, for actual delivery thereof to be made to the directors, or on every sale for the delivery to the brokers of the securities sold to await a meetings of the board or of a committee of directors. The duty of seeing that the securities are in safe custody must of necessity be left to some official of the company, in daily attendance at the office of the company, such as the manager, accountant or secretary"^(q).

Remuneration of directors:—Apart from any express agreement, directors are not entitled to receive any remuneration for the services they render to the company. Articles of association generally fix the remuneration to be paid to the directors, and when so fixed, the amount cannot be altered except by passing a special resolution in that behalf. Under section 93(1)b, any provision in the articles as to remuneration to directors must be disclosed in the prospectus. Where the remuneration is not fixed by the articles, the amount of it is voted upon in general meeting. Once the remuneration becomes due, the director may sue for the recovery of it from the company, and in the case of a company in the course of being wound up, may prove for the same^(r). In the absence of any provision in the articles, a director must bear his own expense of attending board meetings^(s). They are not entitled to pay the income tax on their remuneration out of the company's funds^(t).

83B. (1) In default of and subject to any regulations in the articles of a company other than a private company:—

(q) City Equitable Fire Insurance Co. (1925) 1 Ch. 407.

(r) Dale and Plant (1889) 43 Ch. D. 255.

(s) Young V. Naval Military etc. Society (1905) 1 K.B. 687.

(t) Beecham Proprietary Co. V. Fuke (1906) 1 Ch. 148.

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed; **S. 83B.**

Appointment of directors.

(ii) the directors of the company shall be appointed by the members in general meeting; and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.

(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation.

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section.

Appointment of directors:—The provisions of this section apply only in the absence of anything to the contrary in the articles. The appointment of directors is usually provided for by the articles of a company, including the appointment of the first directors. But the articles may provide that they shall be appointed by the subscribers of the memorandum. In such a case a meeting for the appointment of directors is not necessary where the appointment is made in writing and is signed by all the subscribers^(u). Where the articles

S. 84. do not make any provision for the appointment of the directors, this section provides that the subscribers of the memorandum shall be deemed to be the directors of the company, until the first directors are appointed by the members in general meeting.

84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing:—

Restrictions on appointment or advertisement of director.

- (i) signed and filed with the registrar a consent in writing to act as such director; and
- (ii) save in the case of companies not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) or taken from the company and paid or agreed to pay for his qualification shares or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name;

(2) On the application for registration of the memorandum and articles, if any, of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person

who has not so consented, the applicant shall be liable **S. 85.** to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

Restrictions on appointment of directors:—This section imposes certain restrictions which must be complied with before a person could be capable of being appointed a director of a company. These conditions are, that before registration of the articles or publication of the prospectus, or filing the statement in lieu of prospectus as the case may be, a person to be appointed a director or his agent authorised in writing has, (a) signed and filed with the registrar a consent in writing to act as such director, and (b) (1) signed a memorandum for a number of shares not less than his qualification if any, or (2) taken from the company and paid or agreed to pay for his qualification shares, or (3) signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares, or (4) made and filed with the registrar an affidavit to the effect that a number of shares not less than his qualification are registered in his name.

85. (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

(2) If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the

S. 85. said period or shorter time and the last day on which it is proved that he acted as a director.

Qualification of directors:—The Act does not make it obligatory on the directors to hold any shares in the company. However, clause 10 in Table A lays down that the qualification of a director shall be the holding of at least one share in the company. But generally, the articles of every company provide that the qualification of every director shall be the holding of a specified number of shares, the reason being that this would induce the directors to take a personal interest in the affairs of the company^(v). Where there is a qualification, the director must take up his shares within a period of two months after his appointment or such shorter time as may be fixed by the articles. Where after the expiration of such period of time, any unqualified person acts as a director, he becomes liable to a penalty of Rs. 50 for every day that he so acts as director.

If the possession of a certain number of shares is a condition precedent to his being elected a director, the person elected without the necessary qualification cannot act as director^(w). When the articles require a person to take up his qualification shares from the company, the condition is not satisfied by taking a transfer of shares from the promoters^(x). If a person has agreed to take up shares to qualify himself as a director and does acts in that character, he is bound to take up the shares and is estopped by his conduct from contending that he is not a director^(y). Where the articles provide that a person appointed a director shall be deemed to have ceased to be one if he does not obtain the necessary qualification or should cease to hold it on the happening of any of these events, he automatically ceases to be a director^(z).

But when a person is nominated a director in violation of the articles without qualification, and accepting that nomination he acts as a director, he is not thereby guilty of any

(v) Archer's case (1892) 1 Ch. 322 (C.A.)

(w) Barber's case (1877) 5 Ch. D. 963.

(x) Salton V. New Beeston Cycle Co. (1898) 1 Ch. 375.

(y) Mulk Raj Bhalla V. Official Liquidator (1936) 17 Lah. 577.

(z) Spencer V. Kennedy (1926) 1 Ch. 125.

misfeasance or breach of trust in relation to the company. **S. 86.** To make a director liable he must be shown to have been guilty of some misconduct by which the company has suffered a loss^(a). Where a director accepts a present of his qualification shares from the promoters he is guilty of a breach of trust^(b). But the Court has jurisdiction to relieve a director who has acted as such without having obtained his qualification within the prescribed period, from the penalties to which he would otherwise be subject^(c).

86. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification: Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

Validity of acts of directors.

Validity of acts of directors:—This section provides that as between the company and persons having no notice to the contrary, the acts of directors *de facto* are as good as the acts of directors *de jure*^(d). The effect of the section is to render valid all the *bona fide* acts of *de facto* directors, not only as between the company and outsiders, but also as between the company and its members^(e), the main object of the section being to protect persons who deal with the company. The acts of directors will be valid, notwithstanding it may afterwards be discovered that there was a defect in their appointment. But where a person is put on enquiry with regard to the appointment of a director and is guilty of negligence in not investigating that position, he is not entitled to assume that a notice of appointment of the director is a valid notice, and that the director was validly appointed^(f).

The effect of the proviso is that where the appointment of a director is shown to be invalid, the section does not apply, and the acts of a *de facto* director are henceforth in-

(a) Coventry & Dixon's case (1880) 14 Ch. D. 660.

(b) Pearson's case (1877) 5 Ch. D. 336.

(c) Barry & Staines Linoleum Ltd. (1934) 1 Ch. 227.

(d) Channel Collieries Trust Ltd. V. Dover etc. Rly. Co. (1914) 2 Ch. 506.

(e) Dawson V. African Consolidated Land & Trading Co. (1898) 1 Ch. 6.

(f) B. Liggett Ltd. V. Barclays Bank, Ltd. (1928) 1 K.B. 48.

S. 86B. valid^(g). When defect in the appointment is discovered before the act is done, it does not give validity to the act committed^(h).

86A. (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both.

Ineligibility of
bankrupt to act
as director.

(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India.

Ineligibility of bankrupt:—This and the following sections upto section 86I are new and have been inserted by the Amendment Act of 1936. Prior to the enactment of this section, unless the articles of a company provided to the contrary, an insolvent was not rendered incapable of acting as a director. Since the enactment of this section however, an insolvent is prohibited, under a penalty of two years' imprisonment or rupees one thousand fine, from acting as a director, managing agent or manager of any company.

86B. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company:

Assignment of
office by direc-
tors.

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are

(g) *Bridport Old Brewery Coy.* (1867) 2 Ch. App. 191.

(h) *Harben V. Phillips* (1883) 23 Ch. D. 14.

ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section: **S. 86C.**

Provided always that any such alternate or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which meetings of the directors are ordinarily held.

Explanation:—For the purposes of the provisos to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24-Parganas and Chingleput Districts, respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.

86C. Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void:

Avoidance of provisions relieving liability of directors.

Provided that—

- (a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and
- (b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and

S. 86D.

(c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court.

Provisions to relieve directors from liability:—This section provides that any provision whether contained in the articles or in any contract with a company or otherwise, exempting any director, manager, officer, or auditor, or indemnifying them against liability under the general law in respect of their negligence, default, breach of duty or breach of trust of which they may be guilty in relation to the company shall be void⁽ⁱ⁾. The section follows the parallel section of the English Companies Act of 1929, which was enacted in consequence of the decision in *In re City Equitable Fire Insurance Company*^(j) where it was held that the directors, auditors etc. were not liable for loss suffered by the company, as a complete immunity was afforded to them by the company's articles. As the law now stands, such an article giving immunity to the directors etc. would be invalid.

86D. (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner or to a private company of which such director is a member or director.

Loans of directors.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or in discharging

(i) Govind Narayan V. Rangnath (1930) 54 Bom. 226.

(j) (1925) 1 Ch. 407.

the guarantee shall be liable jointly and severally for S. 86E. the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company.

86E. No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker:

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act.

Explanation:—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company.

Directors not to hold office of profits:—This section provides that no director, or no firm of which the director is a partner, or no private company of which he is director, shall hold any office of profit under the company without the consent of the company in general meeting, except that of a managing director, manager, a legal or technical adviser or a banker. The appointment of a director as a solicitor to the company does not cause him to vacate the office of director^(k) but the appointment of such a person on a fixed salary would cause him to vacate his office of director, as he would then hold an office of profit within the meaning of the section^(l). Where a person holds an office of secretary and receives remuneration as such, but on being elected as director continues to act as secretary but without receiving the remuneration pertaining to the office of secretary, he does

(k) Harper's Ticket Issuing etc. Coy. Ltd. (1912) 29 T.L.R. 63.

(l) Liberator Permanent Benefit Building Society, (1894) 71 L.T. 406.

S. 86G. not hold an "office under the company"^(m), within the meaning of this section.

86F. Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.

Sanction of directors necessary for certain contract.

86G. (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.

Removal of directors:—This section applies only in cases where a director's period of office is liable to determination by retirement in rotation. The section provides that the company may by extraordinary resolution remove him from the office of director before the expiration of the period of office. A director so removed shall not be re-appointed by the board of directors. The Court will not specifically enforce an agreement that a director shall not be remove-

able from office⁽ⁿ⁾, although the director may have a right to claim damages for breach of the agreement. But if the appointment of a person as director is vested in an outside body, an appointment under the right so given may be enforced by the Court. **S. 86L**

Where owing to dissensions between the directors, there is a deadlock in the affairs of the company, the company has power to remove the directors and appoint new directors in their place^(o). The board of directors has no power to prevent a director from acting and if he is excluded, the Court will restrain the co-directors from excluding the plaintiff from acting as director^(p). But a director may be got rid of by taking the appropriate action under the articles. Thus, if it is provided that a director should resign if requested to do so, a request in writing by his co-director to resign operates from the date of the request^(q).

Restrictions on powers of directors.

36H. The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting,—

- (a) sell or dispose of the undertaking of the company;
- (b) remit any debt due by a director.

Vacation of office of Directors.

86L. (1) The office of a director shall be vacated if—

- (a) he fails to obtain within the time specified in sub-section (1) of section 85, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or
- (b) he is found to be of unsound mind by a Court of competent jurisdiction, or
- (c) he is adjudged an insolvent, or
- (d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(n) *Bainbridge V. Smith* (1889) 41 Ch. D. 462.

(o) *British Murac Syndicate V. Alperton Rubber Co. Ltd.* (1915) 2 Ch. 186.

(p) *Saratchandra V. Tarakchandra* (1924) 51 Cal. 916.

(q) *Fell V. Derby Leather Co.* (1931) 2 Ch. 252.

- 86L.** (e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or
- (f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or
- (g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of section 86D, or
- (h) he acts in contravention of section 86-F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section.

Vacation of office of directors :—This section specifies the various circumstances on the happening of which, the office of directors shall be vacated.

Clause (a) :—A person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, must be held to have contracted that he will, within a reasonable time obtain the requisite number of shares. Where therefore, a person continues to act as a director he is liable to be put on the register of members as a holder of the requisite number of shares^(r).

Clause (f) :—The expression "absenting himself" means something more than the expression "is absent"; in other words. the absenting must be voluntary^(s).

Clause (g) :—It is sufficient if it is proved that a director is concerned in a contract with the company, it is not necessary to determine whether he has participated in the profits of such contract or not^(t). On the happening of the event which causes the director to vacate his office, it is not competent to the company to waive the event or condone the offence^(u). **S. 87.**

Register of directors, managers and managing agents.

- 87. (1)** Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say:—
- (a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;
 - (b) in the case of a corporation, its corporate name and registered or principal office; and the full name, address and nationality of each of its directors; and
 - (c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appoint-

^(t) *Star Steam Laundry Co. v. Dukes* (1913) 108 L.T. 367.

87A. ment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register.

Managing Agents

Duration of appointment of managing agent.

87A. (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed to hold office for a term of more than twenty years at a time.

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years.

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any. **S. 87A.**

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid.

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.

Duration of appointment of managing agent:—This and the following sections upto section 87I have been inserted by the Amendment Act of 1936. They regulate the relations between the company and its managing agents, and to that extent supersede the provisions of the articles, or any agreement entered into by the company.

From the date of the commencement of the Amendment Act of 1936 viz., that 15th of January 1937, no managing agent can be appointed as such, for a period of more than twenty years. Even as regards the articles, or agreements entered into before the commencement of this Act, managing agents appointed to office before the 15th of January 1937, shall cease to hold office after a period of twenty years from the said date, unless they are re-appointed. But the termination of such office shall not take effect until all moneys payable to the managing agents for loans made to, or remuneration due from, the company after the date of such termination have been paid. The provisions of the section do not apply to a private company, which is not a subsidiary of a public company.

Except to the extent provided for by sub-section (3), managing agents have no lien on the assets and documents

S. 87B. of the company in respect of advances of loans made by them to the company^(v). Where property is in the possession of managing agents, the Court has power to make a summary order for delivery over of such property into the possession of the company^(w). Where a company thinks it desirable to get rid of its managing agents, it may pay them a lump sum out of its capital in satisfaction of all their claims. The company may also issue debentures for the payment of managing agents, if the company thinks that it is in its interest to do so^(x).

Conditions applicable to managing agents.

87B. Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company—

- (a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company:

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within

(v) *Bombay Saw Mills* (1890) 13 Bom. 314.

(w) *Harbans Prasad V. National Sugar Mills*. (1933) 14 Lah. 68.

(x) *Investment Trust Corporation V. Singapore Traction Coy.* (1935) 1 Ch. 1

thirty days from the date of his conviction or if his conviction is set aside on appeal; **S. 87B.**

- (b) the office of a managing agent shall be vacated if he is adjudged insolvent;
- (c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting:

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment;

- (d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company;
- (e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company: Provided that where the Court finds that the winding

37B.

up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management; and

- (f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86E:

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth.

Conditions applicable to managing agents :—The office of a managing agent is liable to be vacated, if (1) the company resolves in general meeting that the managing agent be removed from office on account of his having been convicted of a non-bailable offence in relation to the affairs of the company, punishable under the Indian Penal Code, or (2) if he is adjudged an insolvent.

A transfer of his office by a managing agent shall be void unless the same is approved by the company in general meeting. A charge or assignment of his remuneration shall be void as against the company. The appointment or removal of a managing agent and a variation of his contract of management made after the 15th of January 1937, shall not be valid unless approved by the company in general meeting. Where a company is wound up, the contract of

managing agency is thereby determined, but without pre- **S. 87C.**
 judice to the right of the managing agent to recover any
 money due to him from the company. But if the winding-
 up is due to the negligence or default of the managing agent
 himself, he shall not be entitled to receive compensation for
 the premature termination of the managing agency contract.
 The provisions of this section do not apply to a private
 company.

87C. (1) Where any company appoints a mana-
 ging agent after the commencement of the Indian Com-
 panies (Amendment) Act, 1936, the
 remuneration of the managing agent shall
 be a sum based on a fixed percentage of
 the net annual profits of the company, with provision
 for a minimum payment in the case of absence of or
 inadequacy of profits, together with an office allow-
 ance to be defined in the agreement of management.

(2) Any stipulation for remuneration additional
 to or in any other form than the remuneration specified
 in sub-section (1) shall not be binding on the company
 unless sanctioned by a special resolution of the com-
 pany.

(3) For the purposes of this section 'net profits'
 means the profits of the company calculated after allow-
 ing for all the usual working charges, interest on loans
 and advances, repairs and outgoings, depreciation,
 bounties or subsidies received from Government or from
 a public body, profits by way of premium on shares sold,
 profits on the sale proceeds of forfeited shares, or pro-
 fits from the sale of the whole or part of the undertak-
 ing of the company but without any deduction in res-
 pect of income-tax or super-tax, or any other tax or
 duty on income or revenue or for expenditure by way
 of interest on debentures or otherwise on capital
 account or on account of any sum which may be set
 aside in each year out of the profits for reserve or any
 other special fund.

(4) This section shall not apply to a private com-
 pany except a private company which is the subsidiary

S. 87D. company of a public company or to any company whose principal business is the business of insurance.

Remuneration of managing agents:—This section provides that a managing agent appointed after the 15th of January 1937 shall only be paid by a fixed percentage on the net annual profits made by the company, subject however, to a minimum payment in cases where no profits or inadequate profits are made by the company. But it is open to a company to sanction an additional remuneration which can only be done by passing a special resolution in that behalf. The provisions of this section do not apply to a private company not being a subsidiary of a public company or to an insurance company.

87D. (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, or to any member or director of the private company, if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

Loans to managing agents.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of subsection (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution a managing agent of the company, or the firm of

which he is a partner, or any partner of such firm, or, **S. 87F.** if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.

87E. (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company:

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.

87F. A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company

Loans to or by companies under the same management.

Purchase by company of shares of company under same managing agent.

S. 88. under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.

87G. A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void.

Restriction on managing agent's powers of management.

87H. A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.

Managing agent not to engage in business competing with the business of managed company.

Limit on number of directors appointed by managing agent.

87I. Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors.

Contracts

Form of contracts.

88. (1) Contracts on behalf of a company may be made as follows (that is to say):—

- (i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

- (ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged. **S. 89.**

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.

Form of contracts :—This and the next two following sections provide for the form and execution of contracts and negotiable instruments made or entered into on behalf of a company. The present section does away with the old English rule of common law under which all contracts entered into by corporations had to be under their common seal, by providing that except in cases where a contract is required by the express provisions of any law to be under seal, contracts entered into on behalf of the company by a person authorised expressly or impliedly are perfectly valid, whether oral or in writing^(y).

But a company cannot be bound by a contract entered into on its behalf before it was incorporated. For, it is not competent to a company to bring into existence a contract with a third party, the terms of which have been arranged before the company was formed. Nor is it competent to the company to ratify any such contract^(z), although it may after incorporation enter into a contract on the same terms as the pre-incorporation contract^(a).

89. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account

(y) *South of Ireland Colliery Coy. V. Waddle* (1869) L.R. 4 C.P. 617.

(z) *Kelner V. Baxter* (1866) L.R. 2 C.P. 174.

(a) *Howard V. Patent Ivory Manufacturing Co.* (1888) 38 Ch. D. 156; *Ram Kumar Potdar V. Sholapur Spg. & Wvg. Co. Ltd.* (1935) 59. Bom. 218.

S. 89. of, the company by any person acting under its authority, express or implied.

Bills of exchange and promissory notes:—The Act does not give to all companies the power of issuing negotiable instruments as an incident of their incorporation. In the case of a non-trading company the power of the company to issue negotiable instruments is to be determined by reference to the memorandum and articles. But in the case of a trading company, the power of issuing negotiable instruments is incidental to the carrying on of its business^(b).

No person is liable upon a negotiable instrument unless his name appears upon the instrument in a manner which, upon a fair interpretation of its terms, shows that the name is the name of the person really liable^(c). In order that the company may be liable, its name must be correctly and clearly stated on the face or on the back of the instrument, so that the responsibility is made plain and can be recognised as the document passes from hand to hand^(d). It must appear upon the bill or note that it was intended to be drawn, accepted or made on behalf of the company^(e). But where a promissory note is executed by a director merely describing himself as director, this does not exclude his personal liability^(e1).

Where the articles empower the directors to authorise one of their body as managing director to draw bills of exchange on behalf of the company a bill drawn by a managing director without having in fact received any authority from his co-directors, renders the company liable, as he is "a person acting under its authority" within the meaning of this section^(f). But where the memorandum and articles give no power to the company to make promissory notes, a promissory note executed by the managing agent on behalf of the company is invalid, for the managing agent is not the authorised agent for the purpose of making promissory notes^(g).

(b) *Queen V. Sir Charles Reed* (1880) 5 Q.B.D. 483.

(c) *Sadasukh Jankidas V. Kishan-Prasad* (1918) 46 I.A. 33.

(d) *Sreelal V. Lister Antiseptic Co. Ltd.* (1925) 52 Cal. 802.

(e) *Bank of Bombay V. H. R. Cormack* (1879) 4 Bom. 275.

(e1) *Damodar V. Ramnath* (1932) 34 Bom. L. R. 1327.

(f) *Dey V. Pullinger Engineering Co.* (1921) I.K.B. 77.

(g) *Jhandumal V. Dehra Dun etc. Tramway Co.* (1930) 52 All. 883.

90. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to **Execution of deeds.** execute deeds on its behalf in any place (either in or outside British India); and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal. **S. 91.**

91. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

Power for company to have official seal for use abroad.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

91A. **91A.** (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement:

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies, and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.

Disclosure of interest by director :—This section introduced by the Amendment Act of 1914 must be read along with section 86 F which has been inserted by the Amendment Act of 1936. Section 86 F lays down that in cases where a director wants to enter into a contract for the sale, purchase or supply of goods or materials with the company,

he shall not do so, except with the consent of his co-directors **S. 91B.**

The present section provides that where a director has a personal interest in a contract which is entered into by him on behalf of the company, he must disclose his interest to the other directors who are not interested^(h). As has been already seen, directors are the agents and trustees of the company. It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract entered into. It may sometimes happen that the terms on which he has dealt or attempted to deal with the estate or interest of those for whom he is trustee, have been as good as could have been obtained from any other person. They may even at the time have been better. But so inflexible is the rule that no inquiry on that subject is permitted⁽ⁱ⁾. The rule is the same when the board seeks to enter into a contract with the company in which a member of the quorum holds shares, whether in trust or beneficially^(j). As he stands in a fiduciary position towards the company, if he makes any profit when he is acting for the company, he must account for it to the company^(k). But in such cases, it is open to the company in general meeting to ratify any such contract in which a director is personally interested^(l).

But articles sometimes allow a director to contract or be interested in a contract with the company, provided he discloses his interest to the other directors and does not vote in the matter. Such articles are valid, but must be read in conjunction with the provisions contained in this Act.

91B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either

(h) *Gluckstein V. Barnes* (1900) A.C. 240.

(i) *Aberdeen Rly. Co. V. Blaikie Bros.* (1854) 1 Mac. 461.

(j) *Transvaal Lands Co. Belgium etc. Co.* (1914) 2 Ch. 488.

(k) *Imperial Merchantile Credit Association V. Coleman* (1873) L.R. 6 H.L. 189.

(l) *Northwest Transportation Co. Ltd. V. Beatty.* (1887) 12 A.C. 589.

S. 91B.

**Prohibition of
voting by inter-
ested director.**

directly or indirectly concerned or interested nor shall his presence count for the purpose of forming a quorum at the time of any such vote; and if he does so vote, his vote shall not be counted:

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) This section shall not apply to a private company.

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.

Prohibition of voting by interested director :—This section provides that a director shall not vote as a director on any contract other than a contract of indemnity in which he is either directly or indirectly concerned or interested, and if he does vote his vote shall not be counted. The section applies to all contracts in which a director is interested, such as the appointment of managing director at a salary^(m). But the section does not debar him from voting as a shareholder when the contract is referred to a general meeting⁽ⁿ⁾. Where the articles provide that a particular number of directors shall form a quorum for the transaction of any business, the quorum meant is a quorum competent to transact and vote on the business, and a resolution therefore passed by a quorum of directors of whom one or more are interested in the matter of the contract is invalid^(o). The directors are not entitled to vote on a resolution which authorises the giv-

(m) Foster V. Foster (1915) 1 Ch. 532.

(n) Northwest Transportation Coy. Ltd. V. Beatty. (1887) 12 A.C. 589.

(o) Yuill V. Greymouth Point etc. Rail & Coal Ltd. (1904) 1 Ch. 32.

ing of an acknowledgment of a debt due to one of themselves^(p). The provisions of this section do not apply to a private company not being a subsidiary of a public company. **S. 91C.**

91C. (1) Where a company enters into a contract for the appointment of a manager or managing agent of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, within twenty-one days from the date of entering into the contract or the varying of the contract, send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

Disclosure on appointment of manager :—Where a director is interested in the appointment of any person as a manager or a managing agent of a company, or in the variation of any such existing contract, this section provides that within twenty-one days from the date thereof, he shall send an abstract of the terms of such contract or variation, along with a memorandum clearly indicating the nature of his interest to every member and the same shall be open to the inspection of any member at the registered office of the company. Section 87 B Cl. (f) further provides that the appointment of a managing agent and a variation of a managing agent's contract of management shall not be valid unless approved by the company in general meeting.

(p) The Coliseum, Ltd. (1930) 2 Ch. 44.

91D. (1) Every manager or other agent of a company other than a private company not being the subsidiary company of a public company who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company and send copies to the directors, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

- (a) the contract shall, at the option of the company, be void as against the company; and
- (b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.

Company as an undisclosed principal:—This section requires that where a contract is entered into by a manager or other agent of a company on behalf of the company, in which contract the company is an undisclosed principal, he shall make a memorandum in writing of the terms of the contract specifying the person with whom it has been made. The memorandum shall then be forthwith delivered to the company and copies thereof sent to the directors. If these requirements are not complied with, the contract shall, at the option of the company be void as against the company. In addition, the manager or other agent shall be liable to a fine not exceeding Rs. 200. The personal liability of the manager or other agent on the contract however, is not in any way affected.

The provisions of this section do not apply to a private company. **S. 9**

Prospectus

Filing of prospectus.

92. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

Filing of prospectus:—Prospectus as defined in section 2 (1) cl. (14), means any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase, any shares or debentures of a company, but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been made and filed.

This section provides that no prospectus shall be issued to the public unless a copy thereof dated and signed has first been filed with the registrar for registration. The pros-

93. pectus should state on the face of it that a copy has been so filed for registration. The question of what does and does not amount to an "issue" is a question of fact, but it certainly does not involve a general application impartially made to all the members of the public. A distribution of a prospectus among a well defined class would be an "issue" within the meaning of the section^(q). If the provisions of this section are not complied with, a company and every person who is knowingly party to the issue of the prospectus shall be liable to a fine of Rs. 50 a day, until a copy thereof has been so filed.

Since it is only a public company that can issue an appeal to the public to subscribe for its shares etc, the provisions of this section cannot from their very nature apply to a private company not being a subsidiary of a public company.

Specific requirements as to particulars of prospectus.

93. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state:—

- (a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption; and
- (b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(q) Nash V. Lynde (1929)

- (c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and
- (ee) where any issue of shares or debentures is under-written, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations; and
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired which is to be paid

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for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

- (ff) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus; and
- (g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and
- (h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subs-

cribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

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- (i) the amount or estimated amount of preliminary expenses; and
- (k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (l) the dates of, and parties to, every material contract including contracts relating to the acquisition of property to which clause (f) applies, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus; and
- (m) the names and addresses of the auditors (if any) of the company; and
- (n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the

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firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

- (o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to the several classes of shares respectively; and
- (p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions.

(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in subsection (1), namely:—

- (i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving

particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact; S. 93

- (ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus:

Provided that if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.

(1B) The statement referred to in clause (ff) of sub-section (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.

93. (1C) Where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof.

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business.

Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of section 154.

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

Specific requirements as to prospectus :—This section has been materially altered by the Amendment Act of 1936, and as it now stands requires more particulars to be stated in a prospectus than what the section required prior to its amendment.

Where a company issues a prospectus, a person contracting to take shares on the faith of the statements therein contained, has a right not only not to be misled by any statement actually false, but to be informed of all the facts the knowledge of which might reasonably have deterred him from so contracting^(r). It is therefore that this section requires that the persons who issue the prospectus shall state therein the various particulars contained in sub-section (1) cls. (a) to (q). Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and conditions which the prospectus holds out as inducement to take shares^(s). No mis-statement or concealment of any material fact or circumstance ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company. The public are in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess. When there has been a fraudulent misrepresentation or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim that he might have known the truth by proper inquiry^(t).

It is a rule of law that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue^(u). A prospectus which while appearing to disclose the true position as to the profits made

(r) *New Brunswick & Canada Rly. & Land Co. V. Muggeridge* (1860) 1 Dr. & Sm. 383.

(s) *New Brunswick & Canada Rly. & Land Co. V. Muggeridge* (1860) 1 Dr. & Sm. 383.

(t) *Central Rly. Co. of Venezuela V. Joseph Kisch* (1867) L.R. 2 H.L. 99.

(u) *Reese River Silver Mining Co. V. Smith* (1869) L.R. 4 H.L. 64.

96. by the company and the dividends declared, makes such a partial disclosure as to be misleading and to give a false impression of the position of the company, is false^(v). A partial statement of the truth may amount to the worst falsehood. If by a number of false statements you intentionally give a false impression and induce persons to act upon it, it is not the less false, although if one takes each statement by itself, there may be a difficulty in showing that any specific statement is untrue^(w).

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase or for any option of purchase, of any property to be acquired by the company, in any case where—

Meaning of
"vendor" in
section 93.

- (a) the purchase-money is not fully paid at the date of issue of the prospectus; or
- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- (c) the contract depends for its validity or fulfilment on the result of that issue.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included the sub-lessee.

Application of
section 93 to
the case of pro-
perty taken on
lease.

96. (1) Any condition requiring or binding any applicant for shares or debentures to waive compliance

(v) *The King V. Lord Kylsant* (1932) 1 K.B. 442.

(w) *Aaron's Reefs V. Twiss* (1896) A.C. 273.

Invalidity of
certain condi-
as to wai-
ver or notice.

with any requirements of section 93, or S. 96
purporting to affect him with notice of
any contract, document or matter not
specifically referred to in the prospec-
tus, shall be void.

(2) It shall not be lawful to issue any form of
application for the shares in or debentures of a com-
pany unless the form is issued with a prospectus which
complies with the requirements of section 93:

Provided that this sub-section shall not apply if it
is shown that the form of application was issued
either—

- (a) in connection with a *bona fide* invitation
to a person to enter into an underwriting
agreement with respect to the shares or
debentures; or
- (b) in relation to shares or debentures which
were not offered to the public.

If any person acts in contravention of the provi-
sions of this sub-section, he shall be liable to a fine not
exceeding five hundred rupees.

Waiver clause :—This section has been materially al-
tered by the Amendment Act of 1936 by the addition of
sub-section (2). The section enacts that a condition requir-
ing or binding an applicant for shares or debentures to waive
compliance with any of the requirements of section 93 or
purporting to affect him with notice of any contract, docu-
ment or matters not specifically referred to in the prospectus
shall be void.

Sub-section (2) provides that it shall not be lawful to
issue any form of application for shares in or debentures of
a company unless the form is issued with a prospectus which
complies with the specific requirements of section 93. But
the section does not apply if it is shown that the application
was, (1) in connection with a *bona fide* invitation to a per-
son to enter into an underwriting agreement, or (2) in rela-
tion to the shares or debentures which were not offered to

- l. 97.** the public. Any contravention of the provisions of this sub-section is punishable with fine which may extend to Rs. 500.

97. (1) If a prospectus is issued which does not comply with the provisions of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of such prospectus until a copy complying with the requirements of section 93 is filed.

(2) In the event of non-compliance with or contravention of any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if he proves that—

- (a) as regards any matter not disclosed, he was not cognisant thereof; or
- (b) the non-compliance or contravention arose from an honest mistake of fact on his part; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused:

Provided that, in the event of non-compliance with or contravention of the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed.

Penalty for non-compliance with section 93 :—This section enacts that where a prospectus does not comply with the specific requirements of section 93 every person who is

knowingly responsible for the issue thereof is liable to a **S. 93** penalty of Rs. 50 for every day from the day of the issue until a copy complying with the requirements of section 93 has been filed.

Sub-section (2) however exonerates a director or other person responsible for the issue of the prospectus for non-compliance or contravention of any of the requirements of section 93, if he proves that (a) as regards any matter not disclosed he was not cognisant thereof, or (b) the non-compliance or contravention arose from an honest mistake of fact on his part, or (c) the Court is of opinion that the non-compliance or contravention was in respect of matters which were immaterial or such as in the opinion of the Court should be reasonably excused.

But the mere fact that there has been an omission to state some of the particulars specified in section 93 does not invalidate the allotment. In such a case the allottee is not entitled to rescind his contract, and his only remedy is against the directors and other persons responsible for the issue of the prospectus^(x).

98. (1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the form marked I in the Second Schedule.

Obligations of
companies
where no pros-
pectus is issued.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act, or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

(x) South of England Natural Gas & Petroleum Co. Ltd. (1911) 1 Ch. 573.

S. 98A. **Statement in lieu of prospectus :—**It is not binding on a company to issue a prospectus on or with reference to its formation. Where a company does not issue a prospectus, it shall not allot any of its shares or debentures unless before the allotment it files with the registrar a statement in lieu of prospectus containing the particulars set out in Form I in the Second Schedule to the Act. These particulars are almost all the same as those required to be stated in a prospectus issued by the company under section 93. The object of the section is that where no prospectus is issued, an applicant for shares shall be able to inspect some document having a similar object.

Where a person subscribes for shares on the faith of misrepresentations contained in the statement in lieu of prospectus he has the same right of rescission as if they were contained in a prospectus. The requirements of the section about proceeding to an allotment however, are satisfied by the mere filing of the statement, whether the particulars are or are not sufficiently supplied and an allotment is not vitiated by their want of accuracy^(y). Where however an allotment is made without a statement in lieu of prospectus being filed the allotment is not absolutely void but merely voidable^(z).

98A. (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the pub-

Document offering shares or debentures for sale to be deemed a prospectus.

(y) Blair Open Hearth Furnace Co. Ltd. (1914) 1 Ch. 390

(z) Jubilee Cotton Mills, Ltd. v. Lewis (1924) A.C. 956.

lic for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof. **S. 98A.**

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot: or
- (b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and
- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf

S. 100. of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.

Offer of shares or debentures for sale :—This section is new and has been inserted by the Amendment Act of 1936. The section enacts that any document by which an offer of shares or debentures to the company is made, shall for all purposes be deemed a prospectus issued by the company with all the legal consequences specified in the section. The object of the section is to prevent the directors from evading compliance with the provisions of section 93. This was frequently done by allotting the company's shares or debentures to the public ; in such cases, the provisions of section 93 did not apply, nor was it a document issued by the directors or other person "on behalf" of the company. This section is therefore designed to put a stop to these malpractices. The document making the offer has further to contain the particulars specified in sub-section (3).

99. A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or

Liability for statements in prospectus.

damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith, unless it is proved— **S. 100.**

- (a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true;
- (b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation: Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and
- (c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document;

S. 100. or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he

may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof. **S. 100.**

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

- (a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;
- (b) the expression “expert” includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

Liability for statements in prospectus:—Where there is a misleading or untrue statement in a prospectus on the faith of which an applicant has applied for and has been allotted shares or debentures in the company, he has two distinct sets of remedies open to him, viz, (1) as against the company, and (2) as against the persons responsible for the issue of the prospectus.

(1) As against the company: Rescission of contract:—Where a person has been induced to take up shares in a company on the faith of certain false or misleading statements

S. 100. contained in the prospectus the contract is voidable at his option and the allottee is entitled to repudiate the shares or debentures^(a), and claim back his money. It is immaterial whether the misrepresentation is fraudulent or innocent. The shareholder who wants to be relieved of his shares on the ground of misrepresentation must exercise his right of repudiation immediately on becoming aware of the facts which entitle him to repudiate the shares^(b). Even a short delay with knowledge of his right may have the effect of defeating the shareholder's right to rescind^(c). This right of rescission which a shareholder has is lost, if after becoming aware of the misrepresentation in the prospectus, he does any act which amounts to an implied ratification of the contract, as in cases where he sells or tries to sell his shares^(d), or pays calls, accepts dividends, and attends and votes at meetings^(e). But his right to rescind will not be affected by anything done by him before he had notice of the misleading or untrue statements contained in the prospectus^(f).

.If a commencement of the winding-up of the company, compulsory or voluntary intervenes, it puts an end to the shareholder's right of rescission^(g). The reason for this is, that the shareholder's name being on the register, if the company goes into liquidation without proceedings having been started for rescission, the shareholder becomes liable as a contributory and he is liable to creditors without reference to any equity as between himself and the company^(h). But if one shareholder commences a litigation to have his name removed and there is an agreement between the company and other repudiating shareholders that all the cases shall stand or fall by the result of his litigation, if that litigation is decided in favour of the litigant shareholder, the others will be relieved, notwithstanding the intervention of the winding-up of the company⁽ⁱ⁾.

(a) Smith's case (1867) 2 Ch. App. 604.

(b) Heyman V. The European Central Rly. Co. (1868) L.R. 7 Eq. 154.

(c) Anderson's case (1881) 17 Ch. D. 373.

(d) Crawley's case (1869) 4 Ch. App. 322.

(e) Sharpley V. Leith & E. C. Rly. (1876) 2 Ch. D. 663.

(f) Stewart's case (1866) 1 Ch. App. 574.

(g) Reese Silver Mining Co. V. Smith (1869) L.R. 4 H.L. 64.

(h) Ookes V. Turquand (1867) L.R. 2 H.L. 325.

(i) Hansraj Gupta V. Asthana (1932) 60 I.A.L.

(i) Pawles' case (1869) L.R. 4 Ch. 497.

In an action for rescission of the contract, it is not necessary for the shareholder to prove fraud. It is sufficient if he proves, (1) that the prospectus contained a false statement^(j), (2) that the statement contained therein was material, and (3) that he was materially influenced by that statement in taking up shares in the company^(k). **S. 100.**

But if a person purchases shares on a misreading of the prospectus, and not on the faith of any representations made therein, the contract cannot be rescinded^(l). Nor is he entitled to rescind if he has bought the shares in the market without having relied on the statements made in the prospectus^(m).

(2) **As against the directors and others responsible for the issue :**

(a) **Criminal liability :—**All persons who are responsible for the issue of the prospectus which contains false or misleading statements are, under section 97, liable to a penalty of Rs. 50 per every day from the day of the issue until a copy complying with the requirements of section 93 has been filed with the registrar.

(b) **Liability for damages under this section :—**When misleading or untrue statements are made in a prospectus or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, (1) every person who has authorised the naming of himself and is named in the prospectus as a director, or (2) as having agreed to become a director, either immediately or after an interval of time, (3) every promoter of the company, and (4) every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus, for any loss or damage they may have sustained.

The section enacts certain defences which are open to all or any of these persons when sued. They are :

(j) *Rees River Silver Mining Co. V. Smith* (1869) L.R. 4 H.L. 64.

(k) *Smith V. Chadwick* (1884) 9 App. Cas. 187.

(l) *Bansidhar Durgadutt V. Tata Power Co. Ltd.* (1925) 27 Bom. L.R. 330.

(m) *Peek V. Gurney* (1873) L.R. 6 H.L. 377.

S. 100. (a) That he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures (as the case may be) believe that the statement fairly represented the facts or was true.

(b) That when the statement purports to be a statement made by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation.

(c) That where the statement purports to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document ; or unless it is proved;

(1) That having consented to be a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority and consent, or

(2) That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his authority or consent, or

(3) That after the issue of the prospectus and before allotment thereunder, he on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reasons therefor.

The allottee who claims compensation has to prove, (1) that there were materially misleading or untrue statements in the prospectus, (2) that he had applied for and taken shares in the company on the faith of the statements contained in the prospectus, and (3) that by reason thereof he has suffered damage⁽ⁿ⁾. In assessing the damages, *prima facie* the price paid for the shares is taken to be the exact equivalent of the value of the shares having the advantages represented in the prospectus^(o).

(n) *Clark V. Urquhart* (1930) A.C. 28.

(o) *McConnel V. Wright* (1903) 1 Ch. 546.

(c) **Liability in an action of deceit :—**Apart from the **S. 100.** provisions of this section, a person who has taken up shares in a company on the faith of certain false and misleading statements is entitled to proceed in an action of deceit against the directors, promoters and other persons responsible for the issue of the prospectus. The right of rescission of the contract as against the company can only be exercised as long as the company has not gone into liquidation. An action of deceit however, may be filed against the directors, promoters etc, even after the company has gone into a winding-up.

In an action of deceit the plaintiff has to prove that there was a fraudulent misrepresentation made by the defendants, and that such misrepresentation has deceived him^(p). It is not merely sufficient to show that there were false statements in the prospectus ; the plaintiff has to go further and prove that he was induced by the misrepresentation complained of, to take up shares in the company^(q). But if a person applies for shares on a misreading of the prospectus and not on the faith of any representations, that have been made to him, he cannot succeed in an action of deceit. Deceit in other words, which does not deceive is no fraud^(r).

But mere non-disclosure of material facts however morally censurable, however that non-disclosure might be a ground for setting aside an allotment, would form no ground for an action of deceit or misrepresentation. There must be some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated, makes that which is stated absolutely false^(s).

Sub-section (3) :—Where the name of any person has been wrongly inserted as a director in a prospectus which is issued on behalf of the company, such director has a right of indemnity against the other directors and all other persons who are responsible for the issue thereof, against all damages, costs and expenses to which he may be made liable by

(p) Derry V. Peek (1889) L.R. 14 App. C. 339.

(q) Smith V. Chadwick (1882) 20 Ch. D. 44.

(r) Durgadutta V. Tata Power Co. Ltd. (1925) 27 Bom. L.R. 330.

(s) Peek V. Gurney (1873) L.R. 6 H.L. 377.

S. 101. reason of his name having been wrongly inserted in the prospectus.

Sub-section (4) :—Where a director or other person responsible for the issue of the prospectus becomes liable to make payment to an allottee under this section he is entitled to a right of contribution as in cases of contract, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

Allotment.

101. (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent. thereof has been paid to or received in cash by the company.

(2) The matters for which the provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely:—

- (a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
- (b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company;
- (c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters, and

(d) working capital.

S. 101.

(2A). The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.

(2B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.

(2C) In the event of any contravention of the provisions of sub-section (2B) every promotor, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and eighty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and ninety days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and ninetieth day: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5). Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent

S. 101. to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

- (a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment; or
- (b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash;

has been subscribed and an amount not less than five per cent. of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

Restriction as to allotment :—This section places certain restrictions on the power of a company to allot its shares unless and until certain conditions have been complied with. It provides that no public company can proceed to allot any of its share-capital unless, (1) shares have been allotted to an amount not less than the minimum subscription which is specified in the prospectus as the minimum amount on which the directors may proceed to allotment, (2) in cases where the said minimum amount or any part thereof is to be provided out of other sources, the balance of the said minimum amount has been subscribed, and (3) a sum of at least 5 per cent. thereof has been paid to or received in cash by the company.

The statement of the minimum subscription which the section requires to be inserted in the prospectus must be an

express statement and not one which can be implied from other statements in the prospectus^(t). The object of the section is that the public when they are asked to subscribe for shares should be notified what was the minimum subscription on which the directors could proceed to allotment^(u). It is a condition precedent to a valid allotment that the whole of the application money should have been paid to and received by the company in cash. Any means by which the money can be remitted may be used, but the remittances must be cleared and the actual cash received by the company before allotment^(v). The said amount must be reckoned exclusively of any amount payable otherwise than in cash.

An allotment of shares in contravention of the provisions of this section is irregular and voidable and the allottee is entitled to rescind the contract to take shares^(w).

Sub-section (4) :—If the minimum subscription is not received within one hundred and eighty days from the date of the issue of the prospectus, all money received from applicants shall forthwith be repaid to them. If not so repaid within a period of one hundred and ninety days after the issue of the prospectus, then the directors shall be jointly and severally liable to repay that money with interest at the rate of 7 per cent. per annum from the expiration of the one hundred and ninetieth day, unless the director proves that the loss of money was not due to any misconduct or negligence on his part.

Sub-section (6) :—The provisions of the section apply only to a company's first allotment of shares which are offered to the public for subscription, and not to every subsequent allotment of shares.

Sub-section (7) :—Where a company does not issue any invitation to the public to subscribe for its shares, no allotment shall be made, unless the minimum subscription being the amount (if any), fixed in the memorandum or in

(t) *Russel V. Burdam* (1909) 1 Ch. 127.

(u) *West Yorkshire Darracq Agency Ltd.* (1908) W.N. 236.

(v) *Mears V. Western Canada Pulp & Paper Co. Ltd.* (1905) 2 Ch. 353.

(w) *Finance & Issue Ltd V. Canadian Produce Corporation Ltd.* (1905) 1 Ch. 37.

S. 102. the articles, and named in the statement in lieu of prospectus, or if no amount has been so fixed and named, the whole of the share-capital other than that issued or agreed to be issued, as fully or partly paid-up, otherwise than in cash, has been subscribed, and an amount not less than five per cent of the nominal amount of each share has been paid to and received by the company.

The provisions of sub-section 7 do not apply to a private company.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of section 98 or section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 98 or section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

Irregular allotment:—An allotment made by the directors in contravention of the provisions of section 101 is not void but voidable at the instance of the applicant within one month after the holding of the statutory meeting, or where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting, within one month after the date of the

allotment^(x). This right of rescission is not affected by the fact that a winding-up of the company has commenced. The section does not require actual legal proceedings to be taken within a month, as a condition of avoidance. Notice of avoidance within a month followed by prompt legal proceedings after the month is sufficient^(y). **S. 103.**

If a director knowingly contravenes the provisions of the section, he is liable to make compensation to the company and to the allottee for any loss or damages or costs which the company or allottee may have sustained thereby. But proceedings to recover any such loss must be commenced within two years from the date of the allotment.

103. (1) A company shall not commence any business or exercise any borrowing powers unless—
Restrictions on commencements of business.

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and
- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in in cash; and
- (c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with; and

(x) Finance & Issue Ltd. v. Canadian Produce Corporation Ltd. (1905) 1 Ch. 37.
 (y) Anstis & McLaren's claim (1908) 2 Ch. 228.

S. 103. (d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled:

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

Restriction on commencement of business :—This section enacts that a public company shall not commence busi-

ness or exercise any borrowing powers unless, (1) the minimum subscription clause has been complied with ; (2) every director has paid to the company on each of the shares taken or agreed to be taken by him the amount which is payable on application and allotment of the shares ; (3) a declaration duly verified by the secretary or one of the directors that the aforesaid conditions have been complied with has been filed with the registrar ; and (4) where a company does not issue a prospectus inviting the public to subscribe for its shares, a statement in lieu of prospectus has been filed with the registrar. **S. 104.**

A certificate given by the registrar is conclusive evidence that the company is entitled to commence business.

Sub-section 3 :—Where a contract is made by a company before the date at which it is entitled to commence business, it shall be provisional only and not binding until the company commences business. The word "provisional" means that the contract is to be read as if it contained a provision that it should not be binding on the company unless and until the company becomes entitled to commence business. Where therefore, a company had gone into liquidation without having become entitled to commence business, a claim by a person on certain contracts, one part of the claim being for moneys paid for furnishing offices for the company, was disallowed^(z).

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

Return as to allotments.

- (a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

(z) Jenkin's claim (1906) 2 Ch. 390.

S. 104.

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid-up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp-duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues:

Provided that, in case of default in filing with the registrar within one month after the allotment any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to

inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper. **S. 104.**

(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.

Return as to allotment :—Whenever a company having a share-capital makes any allotment of its shares, within one month of the date of the allotment, it must make a return to the registrar, stating the number and the nominal amount of the shares allotted, the names, addresses and descriptions of the allottees, and the amount if any paid or due and payable on each share. Where shares are allotted as fully or partly paid-up otherwise than in cash, the company has to produce for the inspection of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale or for services or other consideration in respect of which that allotment was made. An allotment of a fully paid share in exchange for a debenture is an allotment of a share otherwise than in cash within the meaning of this section^(a).

Sub-section (3):—If default is made in complying with the requirement of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding Rs. 500 for every day the default continues. But such a person is entitled to apply to the Court for relief, and where the omission to file the contract is accidental or due to inadvertence the Court has power to order a supplemental contract to be entered into and filed. The entire contract when so filed shall operate as if it had been filed at the time of the issuing of the shares^(b). The Court may also extend the time for the filing of the document for such period as the Court thinks proper.

(a) *Thodapuzha Rubber Coy. Ltd. v. Registrar.* (1918) 41 Mad. 307

(b) *Jackson & Coy. Ltd.* (1899) 1 Ch. 348.

- S. 105.** A failure by the company to comply with the provisions of this section does not affect the title of the allottee to his shares ; the only consequence is the penalty provided in sub-section (3). It does not make the allottee responsible as a contributory for calls as though the shares were unpaid shares^(c).

Commissions and Discounts.

105. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent. of the commission paid or agreed to be paid is—

Power to pay certain commissions and prohibition of payment of all other commissions; discounts, etc.

- (a) in the case of shares offered to the public for subscription, disclosed in the prospectus; or
- (b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and where a circular or notice, not being a prospectus inviting subscription for the shares is issued also disclosed in that circular or notice.

(2) Save as aforesaid and save as provided in section 105A, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance to any

person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional for any shares in the company, whether the shares or money to be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise. **S. 105.**

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

Under-writing agreement & placing of shares :—It is very common for companies to get their shares or debentures underwritten before they are offered to the public for subscription. The object of getting shares underwritten is to make sure that the shares offered to the public will be taken up by them. An underwriting agreement is one whereby the underwriter agrees that in the event of the public not taking up the whole of the shares offered to them for subscription or any specified number of the shares mentioned in the agreement, the underwriter will, in consideration of the stated commission take up the shares not taken up by the public and in respect of which his guarantee extends^(d).

But an agreement to take shares must be distinguished from an agreement to place shares. If a person agrees to take shares, he does at that moment become a shareholder and a company is entitled and is indeed bound, at that mo-

(d) Barrow V. Paranga Mines Ltd. (1909) 2 Ch. 658.

S. 105. ment to put him on the register. But if he agrees to place shares, he does not agree to become a shareholder, nor is the company entitled to put him on the register as a shareholder ; he simply agrees that he will procure other persons to take up the shares^(e). The person who has undertaken to procure subscriptions is not liable to the company if he is unable to procure them^(f).

The liability on a contract to apply for shares under an underwriting agreement passes to the executors of the underwriter^(g). On a like principle, where a sub-underwriting agreement has been entered into it is not competent to the sub-underwriter to revoke his agreement and he will therefore be liable to take the number of shares for which he has agreed to sub-under-write^(h). But where an underwriting agreement has been entered into on the faith of the minimum subscription mentioned in the prospectus; if the minimum subscription clause is varied the underwriter is not bound by the agreement⁽ⁱ⁾.

This section renders it lawful for a company to pay commission to any person in consideration of his subscribing or agreeing to subscribe for any shares in the company provided, (1) the payment of the commission is authorised by the articles, (2) the rate of commission paid or agreed to be paid is disclosed in the prospectus or in the statement in lieu of the prospectus, and (3) the commission paid or agreed to be paid does not exceed the amount or rate so authorised by the articles.

An allotment of shares under a contract which violates the provisions of this section is irregular and an allottee may sue for a declaration that the allotment is invalid as well as for rectification of the register. But, if at the commencement of the winding-up a person is on the register of shareholders with his knowledge and consent, the invalidity under this section of the contract in pursuance of which he applied for and

(e) *Gorrissem's case* (1873) L.R. 8 Ch. App. 507.

(f) *Australian Investment Trust V. Strand & Pitt's properties.* (1932) A.C. 735.

(g) *Warner Engineering Co. Ltd. V. Brennan* (1914) 30 T.L.R. 181.

(h) *Olympic Reinsurance Coy.* (1920) 2 Ch. 341.

(i) *Warner International & Overseas Engineering Coy. V. Kilburn Brown & Co.* (1915) 84 L.J.K.B. 365.

was allotted shares is not a ground for removing his name from the list of contributories. After the winding-up, his liability in respect of his shares arises *ex lege*, viz. under section 156, and not *ex contractu*^(j). **S. 105A**

105A. (1) Subject to the provisions of this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued:
Power to issue shares at a discount. Provided that—

- (a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court;
- (b) the resolution must specify the maximum rate of discount (not exceeding ten per cent. in any case) at which shares are to be issued;
- (c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business;
- (d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with subsection (2), the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees.

(j) *Hansraj Gupta V. N. P. Asthana* (1932) 60 I.A.L.

S. 105B. **Issue of shares at a discount:—**This section has been inserted by the Amendment Act of 1936, and allows a company to issue at a discount shares in a company of a class already issued provided, (1) the issue is authorised by a resolution passed in general meeting and sanctioned by the Court, (2) the resolution specifies the maximum rate of discount, not exceeding 10 per cent, in any case, (3) a period of at least one year must have elapsed since the date when the company was entitled to commence business, and (4) the shares which are to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court, or within such extended time as the Court may, on application allow.

The particulars of discount allowed on the issue of shares must be disclosed in the prospectus and in balance-sheet issued subsequently to the issue of the shares. If default is made, the company and every officer in the company who is in default is liable to a fine not exceeding Rs. 50/-.

105B. (1) Subject to the provisions of this section a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the com-
Issue of re-
deemable pre-
ference shares.

Provided that—

- (a) no such share shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of the redemption or out of sale proceeds of any property of the company;
- (b) no such shares shall be redeemed unless they are fully paid;
- (c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which

would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund", a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company;

S. 105B

- (d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be

S. 105B. redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fees payable under section 249 be deemed to be increased by the issue of shares in pursuance of this sub-section:

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Redeemable preference shares:—This section has been inserted by the Amendment Act of 1936 and enables a company limited by shares if so authorised by its articles to issue preference shares which are, or at the option of the company are to be, liable to be redeemed, subject to certain limitations. These limitations are: (1) the shares must not be redeemed except out of profits made by the company and which are available for dividend, or out of a fresh issue of shares made for the purpose of the redemption, or out of the sale proceeds of any property of the company, (2) the shares cannot be redeemed unless they are fully paid, (3) when the preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, profits which would otherwise have been available for dividend, being a sum equal to the amount applied in redeeming the shares, shall be transferred to a reserve fund to be called "the capital redemption reserve fund", and the provisions of the Act relating to the reduction of share capital shall apply as if the capital redemption reserve fund were the paid-up share

capital of the company, and (4) the premium payable on the redemption must have been provided for out of the profits of the company before the shares are redeemed, in cases where preference shares are redeemed out of the proceeds of a fresh issue. **S. 105C**

Every balance sheet must state what part of the issued capital consists of such shares and the date on or before which they are liable to be redeemed and where no definite date is fixed for redemption the period of notice to be given for redemption. If the balance sheet does not contain the particulars required by this section to be stated therein, the company and every officer of the company who is in default shall be liable to a fine not exceeding Rs. 1,000.

105C. Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the members to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.

Further issue of capital:—This section has been inserted by the Amendment Act of 1936 and provides that where the directors decide to increase the capital of the company by the issue of new shares they are bound to offer such shares to the members of the company in proportion to the existing shares held by each member, irrespective of the class of shareholders to which a member belongs. Such offer must be made by a notice specifying the number of shares to which each member is entitled and a time must be expressly stated therein, within which if the offer is not accepted it will be deemed to have been declined. It is only on the expira-

S. 107. tion of such time or on receipt of an intimation from the member to whom the notice is given that he declines to accept the shares offered to him, that the directors may dispose of them in such manner as they think most beneficial to the company.

106. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

Statement in
balance-sheet
as to commis-
sions and dis-
counts.

Payment of Interest out of Capital.

107. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant:

Power of com-
pany to pay
interest out of
capital in cer-
tain cases.

Provided that—

- (1) no such payment shall be made unless the same is authorised by the articles or by special resolution;
- (2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Local Government, which sanction shall be conclusive evidence for the

purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section; **S. 107.**

- (3) before sanctioning any such payment, the Local Government may, at the expense of the company, appoint a person to inquire and report to such Local Government as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry;
- (4) the payment shall be made only for such period as may be determined by the Local Government; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided;
- (5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as the Governor-General in Council, may, by notification in the Gazette of India, prescribe;
- (6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid;
- (7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate;
- (8) nothing in this section shall affect any company to which the Indian Railway Com-

S. 108.

panies Act, 1895, or the Indian Tramways Act, 1902, applies.

Payment of interest out of capital:—Prior to the enactment of this section a payment of interest out of capital during the construction of a company's works came within the principle that a company cannot pay dividends out of its capital^(k). Since this rule entailed great hardship on companies the present section now permits a company to pay out of its capital interest during the construction of any works or buildings or the provision of any plant provided, (1) the payment is authorised by the articles or by special resolution; (2) the previous sanction of the local Government is obtained for any such payment; (3) before sanctioning it the local Government may at the expense of the company appoint a person to inquire and report as to the circumstances of the case; (4) the payment can be made only for such period as may be determined by the local Government. This period shall in no case extend beyond the half year next after the half year during which the works have been actually completed; (5) the rate of interest shall in no case exceed four per cent. per annum or such lower rate as may be fixed by the local Government; (6) the payment of interest shall not operate as a reduction of share capital; (7) the balance-sheet of the company shall show the capital on which and the rate at which interest has been paid out of capital during the period to which the accounts relate; (8) the provisions of the section shall not apply to a company formed under the Indian Railway Companies' Act 1895 or the Indian Tramways Act, 1902.

Certificates of Shares, etc.

108. (1) Every company shall, within three months after the allotment of any of its shares, debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock, complete and have

of
time for issue
of certificates.

(k) Flitcroft's case (1882) 21. Ch. D. 519.

ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide. **S. 109.**

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Certificates of shares:—This section makes it binding on every company to give to every member, within three months after the date of the allotment of any of its shares etc. and within three months after the registration of the transfer of such shares etc. a certificate of shares held by him, unless the issue of the shares etc. otherwise provide. The certificate of shares must be numbered, and must state the name of the holder, the number of shares held by him distinguished by their numbers and the amount paid or agreed to be considered as paid on the shares of each member, and must be sealed with the seal of the company.

Default under this section is punishable with a fine of Rs. 50/- for every day that the default continues.

Information as to Mortgages, Charges, etc.

109. (1) Every mortgage or charge created after the commencement of this Act by a company and being either—

Certain mortgages and charges to be void if not registered.

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge on any immovable property wherever situate. or any interest therein; or

S. 108.

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Limitation of
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- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge on any immovable property wherever situate. or any interest therein; or

- S. 109.**
- (d) a mortgage or charge on any book debts of the company; or
 - (e) a mortgage or a charge, not being a pledge on any movable property of the company except stock-in-trade; or
 - (f) a floating charge on the undertaking or property of the company;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof varified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

Provided that—

- (i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar; and
- (ii) where the mortgage or charge is created in British India but comprises properly outside British India, the instrument creat-

ing or purporting to create the mortgage or charge or a copy thereof varified in the prescribed manner may be filed for registration notwithstanding that further proceeding may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

- (iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and
- (iv) the holding of debentures entitling the holder to a charge on immoveable property shall not be deemed to be an interest in immoveable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

Registration of mortgages and charges:—This section provides that every mortgage or charge of the kind specified in sub-section (1) cl. (a) to (f) must be registered with the registrar within twenty-one days of its creation. If not so registered it shall, so far as the security on the company's property or undertaking is created thereby, be void against the liquidator and the creditors of the company; but it is good as an admission of the debt. Where however, the company is a going concern and there are no other creditors, the mortgage *qua* mortgage is perfectly good as against the company⁽¹⁾.

S. 109. When the mortgage or charge thus becomes void, moneys secured thereby shall immediately become payable. In addition, the company and every officer of the company who is knowingly a party to the default shall be liable to a penalty not exceeding Rs. 500/- for every day during which the default continues. [Vide S. 122 sub-sec. (1)].

Sub-section (2):—The registration of a mortgage or charge on any property of the company shall be notice of the said mortgage or charge to any person acquiring such property or any part thereof as from the date of such registration. The section avoids an unregistered mortgage as against a subsequent registered encumbrance, even though the subsequent mortgagee had express notice of the prior unregistered mortgage at the time when he took his own security^(m).

Borrowing powers:—Companies like individuals require to borrow money for the purposes of their business. But it is not all companies that can exercise the power of borrowing money. In the case of a trading company, it has an implied power to borrow money for the purpose of its business⁽ⁿ⁾. But a non-trading company has no power to borrow unless such a power has been given to it expressly or inferentially, either by the memorandum or articles. "It was said that every corporation, unless restricted by its act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion, this contention cannot be maintained. The power of a corporation established for certain specified purposes must depend upon what those purposes are and except so far as it has express power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge their duties, or fulfill the purposes for which it was constituted. The express power to borrow given in certain specified cases is against raising an implication of any power to borrow. A

(m) Tacon V. Monolithic Bld. Coy. (1915) 1 Ch. 643.

(n) General Auction Estate Coy. (1891) 3 Ch. 432.

trading corporation stands as regards an implied power of **S. 109.** borrowing in a very different position^(a)."

Where a company has no power to borrow given to it by the memorandum or articles, as well as no implied power to borrow, (not being a trading company), it can, by applying to the Court under section 12 take the requisite power^(p).

Modes of borrowing:—When a company has an express or implied power to borrow, it may exercise its power in such manner as it thinks fit. It may raise money either by way of loan on a promissory note or by a bank overdraft, or by a pledge, or by means of a legal or equitable mortgage on its property, movable or immovable, as well as on bonds, debentures, or a floating charge on the undertaking of the company^(q). Where the memorandum authorises the giving of any security of any description for money borrowed, it is open to a company to create a valid charge on the whole of its uncalled capital^(r). But a company has no power to create a charge on that portion of its capital which in accordance with the resolution passed under sections 68 and 69, could only be called up in the event and for the purposes of the company being wound up^(s).

Ultra vires borrowing:—An *ultra vires* borrowing may be either *ultra vires* the company or *ultra vires* the directors. Where a company has no power to borrow, or where a company borrows in excess of its powers, the borrowing in the first case, and the borrowing in excess of the limit in the second case, are *ultra vires* the company, and the same does not create any debt—and any security given in respect of such loan is void^(t). The lender in such cases is not entitled to recover moneys paid by him on the *ultra vires* contract of loan, on the footing of money had and received by the company for his use^(u).

(a) Queen V. Sir Charles Reed, (1880) 5 Q.B.D. 483, at p. 489.

(p) Revisionary Society (1892) 1 Ch. 615.

(q) Cunliffe Brooks & Co. V. Blackburn & District Benefit Building Society, (1884) 9 A.C. 857.

(r) Newton V. Anglo Australian Investment Co. (1895) A.C. 244.

(s) Bartlett V. Mayfair Property Co. (1898) 2 Ch. 28.

(t) Pooley Hall Colliery Co. (1869) 21 L.T. 690.

(u) Sinclair V. Brougham (1914) A.C. 398.

§. 109. Where the borrowing is *ultra vires* the directors but *intra vires* the company the loan is *prima facie* bad as against company, but the money lent can be recovered, (1) if the company is estopped from contending the invalidity of the loan according to the rule in *Royal British Bank V. Turquand*^(v), or (2) if the loan is ratified by the shareholders in general meeting^(w).

Rights of lender in *ultra vires* borrowing by company:— When the borrowing is *ultra vires* the company, the lender, although he has no right of action against the company on the *ultra vires* contract of loan, is still entitled to certain rights. They are as follows:—(1) If the money he has paid remains intact with the company, he is entitled to follow the same in the hands of the company, and may obtain an injunction restraining the company from parting with it. (2) Where his money has been utilised in paying off the creditors of the company, he is entitled to be subrogated to the rights of the creditors so paid off to the extent to which his money has been so utilised^(x). (3) He is entitled to file a suit against the directors for damages for breach of warranty of authority, if their act amounts to an implied representation of fact^(y); but not if their representation is as to a point of law in regard to borrowing where both parties have had equal means of knowledge^(z).

Sub-section (1):—C1. (a) Debenture and debenture stock:—The word debenture though not defined in the Act, means a security for money, called on the face of it a debenture, and providing for the payment of a specified sum at a fixed rate with interest meanwhile half-yearly. It usually gives a charge by way of security, and in most cases is expressed to be one of a series of debentures^(a). In other words, it is a document which either creates a debt or acknowledges it^(b). The expression "debenture stock" on the other hand, is used to describe a debt which is owing by the

(v) *Pratt (Bombay) Ltd. V. E. D. Sassoon Co. Ltd.* (1936) 60 Bom. 326.

(w) *Irvine V. Union Bank of Australia* (1877) L.R. 2 A.C. 366.

(x) *Airedale Co-operative Worsted Manufacturing Society Ltd.* (1933) 1 Ch. 639.

(y) *Firbank's Executors V. Humphreys* (1886) 18 Q.B.D. 54.

(z) *Rashdall V. Ford* (1866) 2 Eq. 750.

(a) *Palmer's Company Law*. 16th Ed. P. 280.

(b) *Levy V. Abercorrie Slate & Slab Coy.* (1888) 37 Ch. 260.

company, and is usually secured by a trust deed on the property of the company. The essential difference between debenture and debenture stock is, (1) debenture denotes the description of an instrument; while debenture stock describes a debt which is secured by an instrument, (2) debentures are payable at a certain fixed date stated in the debentures, while debenture stock becomes payable only in the event of a winding-up, and (3) debentures are issued only for a certain sum and are transferable in their entirety, while debenture stock can be transferred in any proportions.

Kinds of debentures:—Debentures are of various kinds. They may be, (1) payable to bearer with interest coupons attached to them; these are transferable by mere delivery, (2) payable to registered holder; these can be transferred only according to the conditions contained therein, (3) payable to registered holder but with interest coupons payable to bearer, (4) payable to bearer but with power to bearer to have them placed on the register, as well as to have them at any time withdrawn from the register.

Debentures may also be (1) perpetual or irredeemable, (2) for a certain fixed time, and (3) payable on notice being given.

A debenture, although one document, usually consists of two parts, (1) the instrument containing the promise to pay and the charge, and (2) the conditions endorsed on the back of the instrument. These conditions provide for the transfer of the debentures, the time when and the place where the instrument will be paid, provision for appointment of receiver on default of payment of interest for a certain period, and the *pari passu* clause which puts the holders of debentures of the same series on the same footing. But for the *pari passu* clause, the debentures will rank for priority according to dates of their issue, viz: the first issued to rank first, the second issued to rank second and so on^(c). Another important clause provides for the exclusion of equities. In the absence of such a clause, a debenture being a chose-in-action could only be assignable subject to all equities between

(c) New Clydach Sheet & Bar Iron Coy. (1868) 6 Eq. 514.

S. 109. the company and the original holder^(d). But when such a clause is inserted in a debenture, they are assignable free from and unaffected by any equities^(e).

Trust-deed:—Debentures and debenture stock are usually secured by a trust-deed, conveying property of the company to trustees in favour of debenture-holders, charging the property and containing a number of provisions to regulate the respective rights of the company and the debenture-holders. Immediately after the charge, a clause is inserted setting out the various events on the happening of which the security is to become enforceable. The trust-deed further provides that when the security becomes enforceable, the trustees may in their discretion and at the request of the debenture-holders sell the mortgaged property and apply the net proceeds thereof in paying off the debenture-holders. The deed also empowers the trustees to appoint a receiver of the property on any serious default by the company. The remuneration to which the trustees are entitled is also provided for by the deed, but unless so provided, they can come in only after the payment of the debenture-holders^(f).

Debentures payable to bearer are by reason of merchantile usage recognised as negotiable instruments, transferable by mere delivery^(g). Debentures may be lawfully issued at a discount^(g¹).

Clause (e) : Mortgage or charge on movable property:—Under this clause, which has been newly inserted by the Amendment Act of 1936, a mortgage or charge (not being a pledge) on any movable property of the company (except stock-in-trade) requires to be registered. But a pledge by a company of its moveable property of which the pledgee has been put in possession does not require registration^(h). A floating charge on the stock-in-trade requires to be registered, but if the creditor takes possession of the stock-in-

(d) *Mangles V. Dixon* (1852) 3 H.L. 702.

(e) *Farmer V. Goy & Coy.* (1900) 2 Ch. 149.

(f) *Hodgson V. Accles* (1902) W.N. 164.

(g) *Bechuanaland Exploration Coy. V. London Trading Bank* (1888) 2 Q.B. 658.

Anglo-Danubian Steam Navigation & Colliery Co. (1875) 20 Eq. 339.

(h) *J. D. Jones & Co. Ltd. V. Ranjit Roy* (1927) 54 Cal. 513.

trade, then even though the floating charge is not registered S. his title is not affected as he becomes a pledgee of the property under this clause⁽ⁱ⁾.

Clause (f): Floating charge:—Charges that may be created by a company on its property and undertaking are of two kinds. It may be either a fixed charge or a floating charge. A fixed charge is a charge on ascertained and definite property of the company, and the company can deal with its property but always subject to the charge. A floating charge on the other hand, is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes^(j). A floating charge is ambulatory and shifting in its nature, hovering over and so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach or grasp^(k). In the case of a floating charge the company can deal with or dispose of the property subject to the charge in the ordinary course of its business. The company may also create a subsequent specific charge over specific assets in the ordinary course of its business^(l); such a specific charge will have priority over the floating charge^(m).

A floating security gives an immediate and equitable charge on the assets, subject to the right of the company in the ordinary course and for the purposes of its business but not otherwise, to dispose of the assets as though the charge had not existed⁽ⁿ⁾. It leaves the company at liberty to create specific mortgages to rank in priority to the floating charge^(o).

(i) *Mercantile Bank of India Ltd. V. Chartered Bank* (1937) 1 A.E.R. 231.

(j) *Government Stock etc. Investment Coy. V. Manila Rly. Co.* (1897) A.C. 81.

(k) *Illingworth V. Houldsworth* (1904) A.C. 355.

(l) *Cox Moore V. Peruvian Corporation Ltd.* (1908) 1 Ch. 604.

(m) *Hamilton's Windsor Iron Works* (1879) 12 Ch. D. 707.

(n) *Nelson & Coy. V. Faber & Co.* (1903) 2 K.B. 367.

(o) *Bigger Staff V. Rowatts Wharf*, (1896) 2 Ch. 93.

109A.

A charge is a floating charge, (1) if it is a charge on assets both present and future, (2) if that class is one which in the ordinary course of business of the company would be changing from time to time, and (3) if it is contemplated by the charge that until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged^(p).

A floating charge is valid as against the general as well as the execution creditors of the company^(q). It retains its floating character until a receiver is appointed, either by the Court or by the trustees in exercise of a power of appointment, contained in the trust deed, or until the commencement of the winding-up^(r).

109A. (1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of

(p) *Hamer V. London City & Midland Bank* (1918) 118 L.T. 571; *Houldsworth V. Yorkshire etc. Ass. Ltd.* (1903) 2 Ch. 284.

(q) *General South American Co.* (1876) 2 Ch. D. 337.

(r) *Crompton & Coy. Ltd.* (1914) 1 Ch. 954.

the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar. **S. 110.**

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.

Registration of charges on properties acquired subject to charge:—This section is new and provides that where after the 15th of January 1937, a company acquires any property which is already subject to a charge of the kind specified in sub-section (1) of section 109, the prescribed particulars of the charge together with the instrument by which the charge is created or evidenced, are to be delivered to the registrar for registration within twenty-one days after the date on which the acquisition has been completed.

110. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purposes of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

Particular in case of series of debentures entitling holders "*pari passu*".

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolution authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees (if any) for the debenture-holders:

S. 111. together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

Debentures of a series:—This section enacts that where a series of debentures ranking *pari passu* has been created by a company, it shall be sufficient to file with the registrar for registration, within twenty-one days after the execution of the deed containing the charge, or where there is no deed, after the execution of any debentures of the series, the particulars contained in the section together with the deed or a copy thereof or if there is no deed, one of the debentures of the series. Such registration protects all debentures properly issued in the series^(s). The charge is created on the execution of the deed and not on the day on which the money is advanced by the debenture-holders^(t).

111. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Particulars in case of commission, etc., on debentures.

(s) Fire proof doors. (1916) 2 Ch. 142; Harrogate Estate Ltd. (1903) 1 Ch. 498.

(t) Appleyard V. New London & Suburban Omnibus Co. Ltd. (1908) 1 Ch. 621.

Provided that the deposit of any debentures as S. 114. security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

112. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

Register of
mortgages and
charges.

(2) After making the entry required by subsection (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

113. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act.

Index to regis-
tration of mortga-
ges and charges.

114. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

Certificate of
registration.

Certificate of registration:—The certificate of the registrar is conclusive evidence that all the requirements of the

116. section as to the registration of the debentures have been complied with, and the Court will decline to go into the question whether in fact, the requirements have been complied with^(u). Where the certificate of registration is issued, no subsequent alteration by the registrar in the register can affect the validity of the debentures as between the company and the debenture-holders^(v).

115. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Endorsement of certificate of registration on debenture or certificate of debenture stock.

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Duty of company and right of interested parts as regards registration.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under

(u) *Leicester V. Yolland, Husson & Birkett Ltd.* (1908) 1 Ch. 152.

(v) *Imperial Bank of India V. Bengal National Bank Ltd.* (1930) 57 Cal. 328.

this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid. **S. 119.**

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

Copy of instrument creating mortgage or charge to be kept at registered office.

118. (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

Registration of appointment of receiver.

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver, file with the registrar notice to that effect, and the registrar, shall enter the notice in the register of mortgages and charges.

Filing of accounts of receivers.

S. 120. (2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.

(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent, secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.

Registration of appointment of receiver:—Where a receiver is appointed by the Court or by the debenture-holders in pursuance of an express power reserved to them in the instrument of mortgage or charge, the person who obtains the order or makes the appointment shall within fifteen days from the date of the order or appointment as the case may be, shall file notice of the fact of the appointment with the registrar who shall register it in the register of mortgages and charges. (vide S.118).

Where the receiver has taken possession of the property under the powers contained in any instrument, he shall once in every half year file with the registrar an abstract of the receipts and payments made by him during the period to which the abstract relates, as well as when he ceases to act as receiver, and the registrar shall enter the notice in the register of mortgages and charges.

120. (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created was accidental, or due to inadvertence or to some other suffi-

Rectification of register of mortgages.

cient cause, or is not of a nature to prejudice the position of creditors or share-holders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit. **S. 120.**

(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.

Extension of time for registration:—This section gives jurisdiction to the Court to extend the time for the registration of a mortgage or charge where the said mortgage or charge has not been registered due to accident, inadvertence, or other sufficient cause, or where it is just and equitable. But the Court must be satisfied that the omission to register is not of a nature to prejudice the position of creditors or shareholders of the company. The application for relief may be made either by the company or any other person interested and the Court may grant the relief on such terms and conditions as may be just. The application must be supported by an affidavit setting out the reasons for the omission to register, that no execution proceedings are pending and that the company is not in the course of being wound up^(w). The Court may grant the extension when the parties have acted *bona fide*^(x), but not where the company has gone into liquidation, for the simple reason that the order if made would benefit no one^(y).

Sub-section (2):—This sub-section which has been inserted by the Amendment Act of 1936, gives statutory recognition to the prevailing practice by providing that the

(w) Jackson & Co. Ltd. (1899) 1 Ch. 348.

(x) Tingri Tea Co. Ltd. (1901) W.N. 165.

(y) Abrahams & Sons (1902) 1 Ch. 695.

S. 122. order extending the time for registration is made without prejudice to the rights of persons accrued prior to the time when the security shall be actually registered⁽²⁾. Where therefore debentures are registered in pursuance of an order under this clause, an unsecured creditor is not entitled to rank *pari passu* with such debenture-holders unless he has taken steps to enforce his debt or a winding-up has intervened^(a).

121. (1) It shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof.

Registration or satisfaction of mortgages and charges.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagee calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

122. (1) If any company makes default in filing with the registrar for registration the particulars.—

Penalties.

- (a) of any mortgage or charge created by the company; or
- (b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109A; or

(c) of the issues of debentures of a series, **S. 123.**

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees.

123. (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

Company's register of mort-

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in

S. 124. pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

Company's register of mortgages:—This section requires every company to keep a register of mortgages and charges and enter therein all mortgages or charges specifically affecting the property of the company, and all floating charges on the undertaking or property of the company, giving in each case a short description of the property charged, the amount of the mortgage or charge and the names of the mortgagees. But mere omission to register does not invalidate the security^(b). The only penalty for contravening the provisions of the section is a fine of Rs. 500 when the omission to register is wilful.

124. (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

Right of inspection:—This section gives to members and creditors the right of inspecting the copies of mortgages and

(b) Joseph Wright V. Horton (1887) 12 A.C. 371.

charges kept by the company under section 117, as well as **S. 125.** of the company's register of mortgages maintained by the company under section 123 without the payment of any fees. The register of mortgages shall also be open to the inspection of any other person on payment of such fee not exceeding one rupee for each inspection as the company may prescribe. The right of inspection is not merely personal but may also be exercised through an agent^(c). The right to inspect also includes the right to take copies^(d). The right exists only as long as the company is a going concern. Once the company goes into liquidation, the right to inspect no longer exists, and the only right which a creditor or a contributory may have is such as he obtains in conformity with the order of the Court made under section 241^(e).

125. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holders of any such debentures, and of any holder of shares in the company but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

Right to inspect the register of debenture-holders and to have copies of trust deed.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on pay-

(c) Credit Coy. (1879) 11 Ch. D. 256.

(d) Nelson V. Anglo-American Land Mortgage Agency Co. (1897) 1 Ch. 130.

(e) Somerset V. Land Securities Co. (1897) W.N. 29.

S. 126. ment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

Right to inspect register of debentureholders:—The Act does not require a register of debenture-holders to be maintained by the company. But if such a register is in fact maintained, then this section enacts that it shall be open to the inspection of the registered holders of any such debentures and the holders of shares in the company. But the right to inspect under this section does not carry with it the right to take extracts from the register^(f). This can be claimed only on payment to the company of a sum of annas 6 per every hundred words or fractional part, thereof required to be copied.

Debentures and Floating Charges.

126. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however, remote, or on the expiration of a period however long.

Perpetual debentures.

Perpetual debentures:—It was for some time considered doubtful whether a company had power to issue irredeemable debentures or debentures which could only be redeemed upon the happening of a very remote contingency. The reason for this was that such a condition was considered as a clog hampering the equity of redemption. This section therefore

(f) Balaghat Gold Mining Co. (1901) 2 K.B. 665.

puts the doubt to rest by providing that a condition making a debenture redeemable only on the happening of a contingency however remote is not invalid. But where the business of a company comes to an end by a winding-up, the security ceases to be a floating security and the debentures then become payable and the security enforceable^(g). **S. 127.**

127. (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on

(g) *Player V. Crompton & Co. Ltd.* (1914) 1 Ch. 954.

S. 127. current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

- (a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed; or
- (b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

Re-issue of redeemable debentures:—This section provides that the company is to be deemed always to have had power to keep the debentures alive for the purposes of re-issue, either by re-issuing the same debentures or by issuing other debentures in their place. The debentures previously redeemed can be re-issued except, (1) if the articles or the conditions of the issue expressly otherwise provide, or (2) the debentures have been redeemed in pursuance of an obligation on the company so to do. Upon a re-issue of redeemed debentures the person entitled to them has the same rights and priorities as if the debentures had not been previously issued^(h). S. 129.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

Specific performance of contract to subscribe for debentures.

Specific performance:—Prior to the enactment of this section a contract to take up and pay for the debentures of a company could not be specifically enforced, but the Court only awarded damages for breach of the contract⁽ⁱ⁾. The section as now enacted enables a company to sue for specific performance of a contract to take up and pay for its debentures.

129. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid

Payments of certain debts out of assets subject to floating charge in priority to

(h) *Fitzgerald v. Persse* (1908) 1 Ir. R. 279.

(i) *South African Territories Ltd. v. Wellington*. (1898) A.C. 309.

S. 130. in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

Payment of preferential debts out of assets subject to floating charge:—This section provides for the preferential payment of certain debts where the debentureholders under a floating charge take possession of the company's property comprised in the charge, or a receiver is appointed on behalf of the holders of debentures of a company, secured by a floating charge. Where a debenture is secured by both a fixed and a floating charge and a receiver has been appointed by the debentureholders, the priority given to the preferential debts applies only in respect of assets subject to the floating charge, and not to assets subject to a fixed charge^(j).

Where after notice of any claim that is preferential, the receiver pays away the company's assets to ordinary creditors in the process of carrying on the company's business without making any provision for that preferential claim, he renders himself liable in damages^(k). In such cases he is not entitled to claim indemnity or contribution from the debentureholders, unless the latter have by misrepresentation induced the receiver to pay^(l).

Statements, Books and Accounts.

130. (1) Every company shall cause to be kept proper books of account with respect to—

Books to be kept by company and penalty for not keeping proper books.

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(j) *Lloyds Bank Ltd. v. Lewis Methyr Consolidated Collieries Ltd.* (1929) 1 Ch. 498.

(k) *Woods v. Winskill* (1913) 2 Ch. 303.

(l) *Westminster City Council v. Treby* (1936) 80 Sol-Jou. 465.

- (b) all sales and purchases of goods by S. 130. the company;
- (c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2).

(4) In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.

Books of account:—The section makes it obligatory on every company to keep books of account and enter therein the particulars mentioned in sub-section (1). They are to be kept at the registered office or such other place as may be decided upon by the directors, and shall be open to inspection by them. The directors have a right to see and take copies of the documents belonging to the company, which right may be exercised by them at any time and not necessarily at meetings only^(m).

The company has no power to deal, part with, or pledge its own documents. A receiver and manager appointed by

(m) *Buan V. The London & South Wales Co.* (1890) 7. T.L.R. 118.

S. 131. holders of a mortgage secured on the undertaking, property and assets of the company is not entitled to refuse production of documents material to an action involving a claim based on an alleged fraudulent conspiracy between him and the company⁽ⁿ⁾. But a solicitor is entitled to exercise a lien for his costs on all the documents of the company which have come into his possession before the date of the winding up, but not on those acquired in the course of the winding up^(o).

131. (1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months:

Provided that the registrar may for any special reason extend the period by a period not exceeding three months.

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account

(n) Fenton Textile Association Ltd. V. Lodge (1928) 1 K.B. 1.

(o) Rapid Road Transport Co. (1909) 1 Ch. 96.

so audited together with a copy of the auditor's report **S. 131.** to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during the period of at least fourteen days before that meeting.

Annual balance-sheet:—This section makes it obligatory on every company to lay before the members in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account, at a date not later than 18 months after the date of incorporation of the company, and subsequently once at least in every calendar year. The balance-sheet must be made up to a date not earlier than the date of the meeting by more than nine months, or in the case of the company carrying on business or having interests out of British India, by more than twelve months. The balance-sheet and profit and loss account, or income and expenditure account, shall be audited by the auditor of the company, and his report shall be attached thereto, or it shall be referred to at the foot thereof. This report shall be read at the general meeting and shall also be open to the inspection of any member of the company.

A copy of the balance-sheet so prepared, together with a profit and loss or income and expenditure account, as the case may be, so audited, along with a copy of the auditor's report shall be sent to the registered address of every member at least fourteen days before the meeting at which it is to be laid before the members of the company. A copy thereof shall also be deposited at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before the meeting.

The purpose of the balance sheet is primarily to show that the financial position of the company is at least as good as there stated, and not to show that it is not or may not be better. A company therefore has no power to make regu-

S. 132. lations precluding the auditors from availing themselves of all the information to which they are entitled, as material for the report to be made by them to the shareholders as to the true state of the company's affairs^(p).

131A. (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs, the Director's Report. amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.

(3) The provisions of sub-section (3) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section.

Directors' Report:—Under this section which has been inserted by the Amendment Act of 1936, the directors are under an obligation, (1) to make and attach to every balance sheet a report as to the company's affairs, (2) the amount, if any, of the dividend which they recommend, and (3) the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically in the balance-sheet. This report may be signed by the chairman of the directors on their behalf, if so authorised by them.

132. (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving such Contents of balance-sheet. particulars as will disclose the general

(p) Newton V. Birmingham Small Arms Coy. (1906) 2 Ch. 378.

nature of those liabilities and assets and how the value of the fixed assets has been arrived at. **S. 132A.**

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit.

(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto.

132A. (1) Where a company, in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance-sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent—

Balance-sheet to include particulars as to subsidiary companies.

- 132A.** (a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and
- (b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts:

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner:

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent. or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of the subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the

accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period. **S. 132A.**

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

Balance-sheet of holding company:—This section has been inserted by the Amendment Act of 1936, and requires that when the holding company holds shares in a subsidiary company, there shall be annexed to the balance-sheet of the holding company, (1) the last audited balance-sheet, (2) the profit and loss account and (3) the auditors' report of the subsidiary company and (4) a statement showing how the profits and losses of the subsidiary company have been dealt with. The balance-sheet is also bound to show in particular how and to what extent (a) provision has been made for the losses of the subsidiary company in the accounts either of that company or of the holding company, and (b) losses of the subsidiary company have been taken into account in arriving at the profits and losses of the company as

S. 133. disclosed in its accounts. The statement must be signed (1) in the case of a banking company, by the manager or the managing agent and also by at least three directors, and (2) in the case of any other company by two directors, or where there are no two directors, by the sole director as well as the manager or managing agent, if any.

133. (1) Save as provided by sub-section (2) the balance-sheet and profit and loss account or income and expenditure account shall—

Authentication
of balance-sheet

- (i) in the case of a banking company, be signed by the manager or managing agent if any and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors;
- (ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager or managing agent (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet and profit and loss account or income and expenditure account shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet and profit and loss account or income and expenditure account a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as

required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees. **S. 135.**

134. (1) After the balance-sheet and profit and loss or the income and expenditure account have been laid before the company at the general meeting three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of the members and summary prepared in accordance with the requirements of section 32.

Copy of balance-sheet to be forwarded to the registrar.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

135. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the profit and loss account or the income and expenditure account and the auditor's report at a charge not exceeding six

copies of the balance-sheet and

- S. 136.** the auditor's re- annas for every hundred words or frac-
port. tional part thereof.

Statement to be published by Banking and certain other Companies.

136. (1) Every company being a limited bank-
ing company or an insurance company or a deposit,
provident or benefit society shall, before
it commences business, and also on the
first Monday in February and the first
Monday in August in every year dur-
ing which it carries on business, makes
a statement in the form marked G in the Third
Schedule, or as near thereto as circumstances will admit.

Certain com-
panies to pub-
lish statement
in schedule.

(2) A copy of the statement together with a copy
of the last audited balance-sheet laid before the mem-
bers of the company shall be displayed and, until the
display of the next following statement, kept displayed
in a conspicuous place in the registered office of the
company, and in every branch office or place where the
business of the company is carried on.

(3) Every member and every creditor of the
company shall be entitled to a copy of the statement on
payment of a sum not exceeding eight annas.

(4) If a company makes default in complying
with the requirements of this section, it shall be liable
to a fine not exceeding fifty rupees for every day dur-
ing which the default continues; and every officer of
the company who knowingly and wilfully authorises
or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance
company or provident insurance society to which the
provisions of the Indian Life Assurance Companies
Act, 1912, or of the Provident Insurance Societies Act,
1912, as the case may be, as to the annual statements
to be made by such company or society, apply with or
without modifications, if the company or society com-
plies with those provisions.

*Investigation by the Registrar.***S. 137.**

137. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

Power of registrar to call for information or explanation.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit.

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose

S. 137. a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Local Government.

(6) If it is represented to the registrar in materials placed before him by any contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.

Investigation by the registrar:—This section empowers the registrar, by a written order to call on the company submitting documents to him, to furnish in writing such information or explanation as he may specify in his order, when on perusal of any document he finds that such information or explanation is necessary. It shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power. Default under this section is made punishable by a fine not exceeding Rs. 50 in respect of each offence. In addition, the Court may make an order for the production of such documents as may reasonably be required by the registrar for his investigation. When the information called for is not furnished or if after perusal of such information or explanation the registrar is of opinion that the document discloses an unsatisfactory state of affairs or that it does not disclose a full and fair state

of affairs or that it does not disclose a full and fair statement of the matters to which it purports to relate, he shall report in writing the circumstances of the case to the Local Government.

Sub-section (6):—This sub-section is new and provides that where it is represented to the registrar by any contributory or creditor that the business of the company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, the registrar may call on the company for the information or explanation on matters specified in the order, and he shall have the same powers of investigation as those stated above. But if upon such investigation the registrar finds that the representation made to him was either frivolous or vexatious, he shall disclose the identity of the informant to the company in order to enable the company, if it thinks fit, to institute a suit for damages for furnishing false information so as to affect its good name and credit.

Inspection and Audit.

138. The Local Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Local Government may direct—

Investigation of
affairs of com-
pany by ins-
pectors.

- (i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;
- (ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;
- (iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;

- 141.** (iv) in the case of any company, on a report by the registrar under section 137, subsection (5).

139. An application by members of a company under section 138 shall be supported by such evidence as the Local Government may require for the purpose of showing that the applicants have good reasons for, and are not actuated by malicious motives in, requiring the investigation; and the Local Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

Application for inspection to be supported by evidence.

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

Inspection of books and examination of officers.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

141. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the Local Government, and a copy of the report shall be forwarded by the Local Government to the registrar and another copy to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

Results of examination how dealt with.

(2) The report shall be written or printed, as the Local Government directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Local Government directs the same to be paid by the

company, which the Local Government is hereby **S. 141A.** authorised to do.

Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land revenue.

(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody.

141A (1) If from any report made under section 138 it appears to the Local Government that any Institution of person has been guilty of any offence in prosecutions. relation to the company for which he is criminally liable, the Local Government shall refer the matter to the Advocate General or the Public Prosecutor.

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.

S. 144. Power of company to appoint inspectors.

142. (1) A company may by a special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Local Government, except that, instead of reporting to the Local Government, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Local Government.

143. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

144. (1) No person shall be appointed or act as an auditor of any company other than a private company not being the subsidiary company of a public company unless he holds a certificate from the Governor General in Council entitling him to act as an auditor of companies:

Qualifications and appointment of auditors.

Provided that a firm whereof all the partners practising in India hold such certificates may be appointed by its firm-name to be auditor of a company, and may act in its firm-name.

(2) The Governor General in Council may, by notification in the Gazette of India and after previous publication, make rules providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation:

Provided that nothing contained in such rules shall **S. 144.** preclude any person from being granted a certificate merely by reason that he does not practise as a public accountant.

(2A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

- (a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates;
- (b) prescribe the qualifications for enrolment on the Register and the fees therefor;
- (c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees;
- (d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register;
- (e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise him on all matters of administration relating to accountancy, and to assist him in maintaining the standards of qualification and conduct of persons enrolled on the Register; and
- (f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Governor General in Council may select, to advise him and the Indian Accountancy Board on any matter that may be referred to them.

(2B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.

S. 144. (3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the Local Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons: that is to say,

- (i) a director or officer of the company; and
- (ii) a partner of such director or officer; and
- (iii) in the case of a company other than a private company, not being the subsidiary company of a public company any person in the employment of such director or officer; and

(iv) any person indebted to the company shall not be appointed auditors of the company and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting:

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen

days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting. **S. 144.**

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

Auditors: Their qualification and appointment :— The section provides that it is only persons who hold a certificate from the Governor General in Council, that are entitled to act as auditors of public companies. The auditors are appointed and their remuneration fixed by the company in general meeting; they are to act until the next annual general meeting. In default, sub-section (4) empowers the Local Government on the application of any member of the company, to appoint an auditor and to fix his remuneration.

Sub-section (5): Disqualifications:— Certain persons from their relation to the company are disqualified from acting as auditors. They are (1) a director or officer of the company, (2) a partner of such director or officer, (3) any person in the employment of the company, and (4) any person indebted to the company.

S. 145. Sub-section (6): Appointment of new auditors:—If it is intended to propose the appointment as an auditor of a person other than a retiring auditor, then notice of an intention to nominate that person to the office of auditor shall have been given by a member to the company, not less than fourteen days before such annual general meeting. In such a case the company shall send a copy of such notice to the retiring auditor and shall also give notice to its members either by advertisement or in the mode prescribed by the articles, at least seven days before the annual general meeting.

The auditors are the servants of the company, and if the shareholders do not desire them to act, no Court would, by mandatory injunction force them upon the company^(p1).

145 (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

Powers and
duties of audi-
tors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet and profit and loss account laid before the company in general meeting during their tenure of office, and the report shall state:—

- (a) whether or not they have obtained all the information and explanations they have required; and
- (b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and
- (c) whether or not such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best

(p1) Cuff V. London and County Land & Building Co. Ltd. (1912) 1 Ch. 440.

of their information and the explanations given to them, and as shown by the books of the company; and

- (d) whether in their opinion books of account have been kept by the company as required by section 130.

(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees.

Duties of Auditors:—Lord Justice Lindley has in *In re London & General Bank*^(q) laid down the duties of auditors in terms which have now almost become classical, "It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans, with or without security. It is nothing to him whether the business of the company is conducted prudently or imprudently, profitably or unprofitably. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined

(q) (1895) 2 Ch. 673 at 682-683.

S. 145. to that. But there comes the question, how is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiring and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable steps to ascertain that they do so. Unless he does this, his audit would be an idle farce. Assuming the books to be so kept as to show the true position of the company, the auditor has to frame a balance-sheet showing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company.

"An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without want of any reasonable care on his part, say by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest i.e. he must not certify what he does not believe to be true, and he must take reasonable skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe businessmen select a few cases at random to see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but still an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting upon the opinion of an expert where special knowledge is required."

In re City Equitable Fire Insurance Co. Ltd.^(r) Romer J. applied the principles enunciated by Lindley J. and also the following further principles relative to the duties of auditors:- **S. 146.**

"An auditor is not even justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left whenever such personal inspection is practicable.

"Whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or if his requirement is not complied with, to report the fact to the shareholders, and this whether he can or cannot make a personal inspection.

"Auditors should not be content with a certificate that securities are in the possession of a particular company, firm or person, unless the company, etc. is trustworthy or as it is sometimes put, respectable, and further is one that in the ordinary course of business keeps securities for its customers. In all these cases the auditor must use his judgement."

It is the duty of the auditor in auditing the accounts of the company not to confine himself to verifying the arithmetical accuracy of the balance-sheet but to inquire into its substantial accuracy and to ascertain that it contains the particulars specified in the articles. They are bound to know or make themselves acquainted with their duties under the articles of the company whose accounts they are appointed to audit^(s). If on account of a breach of their duty improper payments have been made by the directors, the auditors are liable to an action for damages^(t). They could also be proceeded against in an action for misfeasance under section 235 if the company goes into liquidation.

146. (1) Holders of preference shares and debentures of a company shall have the same right to

(r) (1925) 1 Ch. 409.

(s) Republic of Bolivia Exploration Syndicate Ltd. (1914) 1 Ch. 139; Kingston Mill Coy. (1896) 2 Ch. 279.

(t) Leeds Estate Bld. & Investment Co. V. Shepherd (1887) 36 Ch. D. 787.

S. 148.

Rights of preference share-holders, etc., as to receipts and inspection of reports, etc.

receive and inspect the balance-sheet and profit and loss accounts of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act.

Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company.

Carrying on business with less than the legal minimum of members.

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

Liability for carrying on business with fewer than seven or, in the case of a private company, two members.

Service and Authentication of Documents.

148. A document may be served on a company by leaving it at, or sending it by post to the registered office of the company.

Service of documents on company.

149. A document may be served on the registrar **S. 151.**
 by sending it to him by post, or deliver-
 ing it to him, or by leaving it for him at
 his office.

Service of do-
 cuments on re-
 gistrar.

150. A document or proceeding requiring
 authentication by a company may be signed by a
 director, secretary or other authorised
 officer of the company, and need not be
 under its common seal.

Authentication
 of documents.

*Tables, Forms and Rules as to prescribed
 matters.*

151. (1) The forms in the Third Schedule or
 forms as near thereto as circumstances
 admit shall be used in all matters to
 which those forms refer.

Application and
 alteration of
 tables and
 forms, and
 power to make
 rules as to pre-
 scribed matters.

(2) The Governor General in Council
 may alter any of the tables and forms in
 the First Schedule, so that he does not
 increase the amount of fees payable to the registrar in
 the said Schedule mentioned, and may alter or add to
 the forms in the Third Schedule.

(3) Any such table or form, when altered, shall
 be published in the Gazette of India, and on such publi-
 cation shall have effect as if enacted in this Act, but
 no alteration made by the Governor General in Council
 in Table A in the First Schedule shall affect any com-
 pany registered before the alteration, or repeal, as res-
 pects that company, any portion of that table.

(4) In addition to the powers hereinbefore con-
 ferred by this section, the Governor General in Coun-
 cil may make rules providing for all or any matters
 which by this Act are to be prescribed by his authority.

(5) Every such rule shall be published in the
 Gazette of India, and on such publication shall have
 effect as if enacted in this Act.

S. 153.*Arbitration and Compromise.*

152. (1) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person.

Power for com- to refer matters to arbitration.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

Reference to arbitration:—This section gives power to companies to refer by written agreement any existing or future dispute between itself and any other company or person in accordance with the provisions of the Indian Arbitration Act 1899. The section is merely enabling and not obligatory, the provisions of the section being applicable only when the parties decide to go to arbitration in pursuance of this Act. The company can also apply to have an award filed in Court under para 21(1) of Schedule II of the Civil Procedure Code 1908^(u).

153. (1) When a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the

Power to compromise with creditors and members.

(u) *Sitaram Balmukund V. Puniab National Bank Ltd.* (1936) 17 Lah. 722.

case may be, to be called, held and conducted in such **S. 153.** manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "company" means any company liable to be wound up under this Act and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

S. 153. (7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.

Powers to compromise with creditors and members:—

This section gives power to a company to enter into compromise with its creditors or members or with any class of its creditors or members. Such compromise or arrangement is valid if the Court is satisfied that the resolution in favour of it was passed by a majority in number representing three-fourths in value of the creditors or members, and the proposal is such that honest and intelligent members of the class concerned acting in respect of their own interest would approve^(v). A scheme of arrangement under this section is an alternative mode of liquidation which the law allows the statutory majority of creditors to adopt, whether the company is a going concern or whether it is in the course of being wound up^(w). A reorganisation of the share capital may be effected as an arrangement with the members under this section, but if it involves a dealing with the capital, the provisions of sections 50, 54 and 55 must be complied with^(x).

Where a compromise or arrangement is proposed, application may be made to the Court by the company or any creditor or any member or the liquidator, when the company is in the course of being wound up, for an order directing the calling of a meeting of the particular class of creditors or members as the case may be, for the purpose of ascertaining their intention and for approving of the scheme with or without any modification^(y). When such an application is made the Court may stay the commencement or continuation of any suit or other proceeding against the company on such terms as it thinks fit.

Powers of Court:—The Court has jurisdiction to sanction a scheme with the creditors, members or contributories, notwithstanding the dissent of one class of creditors, members or

(v) *Dorman Lang & Coy.* (1934) 1 Ch. 635.

(w) *London Chartered Bank of Australia* (1893) 3 Ch. 540; *Katni Cement Industrial Coy. Ltd.* (1937) 39 Bom. L.R. 675.

(x) *Palace Hotel Ltd.* (1912) 2 Ch. 438.

(y) *United Provident Assurance Co. Ltd.* (1911) W.N. 40.

contributories as the case may be, if the Court is satisfied, **S. 153.** that having regard to the value of the company's assets the dissenting class has no interest^(z). The Court has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority and that the majority are acting bona fide^(a). Where there is nothing unreasonable or unfair in the scheme, the Court will defer to the expressed opinion of the great majority of the class affected^(b). But the Court will not approve of a scheme merely because it has been approved by a large majority; it will require to be satisfied that the proposed arrangement is fair and equitable^(c). The power given to the Court to sanction a scheme between a company in liquidation and its creditors extends also to debenture-holders and other secured creditors and enables the Court to sanction a scheme, although it deprives the debenture-holders of their security wholly or in part^(d). A scheme which reorganises and alters the rights conferred by the memorandum upon the different classes of shareholders in order to enable the company to transfer its undertaking to another company can be sanctioned by the Court under this section, even though it may involve a winding up of the company^(e). But it is not the function of the Court to substitute its own scheme for that of the creditors or members, and if the Court thinks that it could not sanction it without radical alteration, the Court ought to reject it^(f).

Before sanctioning a scheme, the Court may impose conditions for safeguarding the interests of the dissentient members or creditors of the company. As a rule however, the Court will not make any provision in favour of the dissentients if it is satisfied that the scheme is reasonable and fair and in the interest of the general body of shareholders. Such a provision is not a *sine que non* to the sanction of the scheme, even though it involves acts which apart from the provisions

(z) *Sorsbie V. Tea Corporation Ltd.* (1904) 1 Ch. 12.

(a) *Tata Iron & Steel Co. Ltd.* (1927) 30 Bom. L.R. 177.

(b) *English Scottish & Australian Chartered Bank.* (1893) 3 Ch. 385.

(c) *Empire Mining Co.* (1890) 44 Ch. D. 402.

(d) *Alabama, Neworleans, etc. Rly. Co.* (1891) 1 Ch. 213.

(e) *Katni Cement & Industrial Coy. Ltd.* (1937) 39 Bom. L.R. 675.

(f) *Dawson V. J. Hormusji* (1932) 10 Rang. 438.

S. 153A. of this section would be *ultra vires* the company. But this rule is subject to the limitation that if this Act contains express provisions enabling the doing of any act in a particular way, the provisions of the enabling section and not those of section 153 should be followed^(g).

It is not necessary that there should be a pending litigation. All that is necessary is that there must be a difficulty which cannot be got over without an arrangement^(h). When once a scheme is sanctioned by the Court, it becomes binding on every person having a pecuniary claim against the company, whether actual or contingent⁽ⁱ⁾, from the dates on which it was agreed upon and not from the date when the sanction is given^(j). Any variation of the scheme thereafter made without the sanction of the Court would be invalid^(k).

The property, rights, powers and liabilities of a company transferred to another company under an order of the Court made in pursuance of this section include the right to the services of and the liability to remunerate an employee under the terms of a contract of service entered into by the transferor company and the employee^(k1).

153A. (1) Where an application is made to the Court under section 153 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor

Provisions for facilitating arrangements and compromises.

(g) *Katni Cement & Industrial Co. Ltd.* (1937) 39 Bom. L.R. 675.

(h) *Guardian Assurance Co.* (1917) 1 Ch. 431.

(i) *Midland Coal & Iron Co.* (1895) 1 Ch. 267.

(j) *Raghubir Dayal V. Bank of Upper Burma Ltd.* (1919) 46 I.A. 135.

(k) *Premila Devi V. Peoples Bank of Northern India Ltd.* (1939) 41 Bom. L.R. 147

(k1) *Nokes V. Doncaster Amalgamated Collieries, Ltd.* (1940) 9 Com. Cas. 33.

company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

- (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without winding up, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by

S. 153A. virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, rights and powers of every description, and the expression 'liabilities' includes duties.

(5) Notwithstanding the provisions of sub-section (6) of section 153, the expression 'company' in this section does not include any company other than a company within the meaning of this Act.

Reconstruction and amalgamation:—This and the next following sections are new and have been inserted by the Amendment Act of 1936. The present section provides that where any compromise or arrangement has been proposed between a company and its creditors or members and the same has been proposed in connection with or for the purposes of a scheme for the reconstruction of the company or the amalgamation of two or more companies and under the scheme the whole or any part of the undertaking or property of the company has to be transferred to another company, the Court may at the time of sanctioning the scheme or at any subsequent time make provision for any or all of the matters specified in clauses (a) to (f) of sub-section (1).

The matters for which the Court makes provision are:—

(a) the transfer of the whole or any part of the undertaking or property as well as the liabilities of the transferor company to the transferee company, (b) the allotment of any shares, debentures, policies or other interests amongst the members of the old company, (c) the continuation of any legal proceedings by or against the transferee company pend-

ing by or against the transferor company, (d) the dissolution (without winding up) of the transferor company, (e) the provision for any persons who within a stated time dissent from the compromise or arrangement, and (f) all other incidental matters to ensure that the reconstruction or amalgamation shall be complete. **S. 153 A**

Reconstruction:—When an undertaking carried on by a company, is in substance preserved and transferred not to an outsider but to another company consisting substantially of the same shareholders with a view to its being continued by the transferee company that is a “reconstruction”⁽¹⁾.

Amalgamation:—Amalgamation means the blending of substantially two or more existing undertakings into one, the shareholders of each blended undertaking becoming substantially the shareholders in the company which holds the blended undertakings. There may be an amalgamation, whether by the transfer of two or more undertakings to a new company or by the transfer of one or more undertakings to an existing company^(m). Amalgamation in some cases is effected by the registration of a new company which takes over the undertakings of several existing companies; sometimes one of the existing companies takes over the undertakings of the other companies, but the company must be authorised by its constitution to do so, for it is not within the scope of the company's objects to purchase the goodwill of another company^(ml).

The difference between a reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuation of one concern as in the former⁽ⁿ⁾.

Sub-section (3) provides that where the Court makes an order sanctioning a scheme for the reconstruction or amalgamation, the company in relation to which the order is made shall cause a certified copy thereof to be filed with the registrar for registration within fourteen days after the comple-

(1) *Hooper V. Western Counties Coy.* (1892) W.N. 148.

(m) *Wild V. South African Supply & Coal Storage Co.* (1904) 2 Ch. 268.

(ml) *Ernest V. Nicholls* (1857) 6 H.L. 414.

(n) *Walker V. Corporation of Royal Exchange Assurance* (1935) 1 Ch. 567.

S. 153B. tion of the order. And if there is default, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a penalty not exceeding Rs. 50/-.

153B. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as the 'transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the

order direct instead of the terms provided by the scheme **S. 153B.** or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

Power to acquire shares of dissenting members:—

Where within four months after the making of the offer by the transferee company the holders of not less than three-fourths in value of the shares in the transferor company approve of a scheme involving a transfer of the company's shares to the transferee company, the transferee company may within two months after the expiration of the said four months give notice to any dissentient shareholder that it desires to acquire

S. 154. its shares, and the transferee company shall be entitled and bound to acquire these shares on the same terms as the shares of the approving shareholders on the expiration of one month from the date on which the notice was given, unless the Court on an application made to it within one month from the date of the notice by the transferee company, thinks fit to order otherwise.

Upon a petition to sanction a scheme of arrangement or amalgamation, the Court has power to determine the terms upon which the shares of dissenting shareholders shall be acquired^(o). Where the scheme has been approved of by a statutory majority the Court will presume it to be a fair one and will sanction it^(p).

Conversion of private company into public company

154. (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company, shall, as on the date of the alteration, cease to be a private company and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

Conversion of
private company
into public
company.

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease

(o) *Castner-Kellner Alkali Coy. Ltd.* (1930) 2 Ch. 349.

(p) *Hoare & Co. Ltd.* (1934) 150 L.T. 374.

to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company: **S. 154.**

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.

Formation of a private company:—In order to form a private company, a memorandum and articles must be subscribed by at least two persons. The application for registration must be signed by the subscribers and must be in such a form as to show that the company does not issue an invitation to the public to subscribe for its shares. The application must be accompanied by a statutory declaration that the provisions of the Act have been complied with.

Obligations and duties:—(1) The number of members must be kept at least upto two and not more than fifty.

(2) The articles must contain a prohibition to the public to subscribe for any of its shares.

(3) Where the articles require a share qualification, a person cannot act as director without having obtained one.

(4) The company is under a duty to make a return of allotments to the registrar under section 104.

(5) The company is bound to register its mortgages and charges.

(6) The company must convene an extraordinary general meeting on requisition.

(7) The company is bound to make an annual return to the registrar and to have its accounts audited.

154. Privileges and exemptions: — The following are the special privileges and exemptions to which a private company is entitled under the Act:—

(1) A private company is not bound to keep an index of its members. [S. 32(1)].

(2) A private company cannot issue share-warrants payable to bearer. [S. 43(2)].

(3) It is not bound to hold the statutory meeting nor to file the statutory report. [S. 77 (11)].

(4) It is not bound to have any directors at all. [S. 83A (2)].

(5) It need not file with the registrar the consent in writing to act as director. [S. 34(3)].

(6) The prohibition to make loans to its directors does not apply to a private company. [S. 86D(3)].

(7) Rules as to the duration of the managing agency agreement does not apply to a private company. [S. 87A (5)].

(8) The provisions as to the retirement of two-thirds of the directors do not apply to a private company. [S. 87B].

(9) The provisions as to remuneration of managing agents do not apply to a private company. [S. 87C (4)].

(10) The restrictions on the number of directors who may be appointed by the managing agents do not apply to a private company (S. 87 I).

(11) The prohibition of voting by interested directors do not apply to a private company. [S. 91B (3)].

(12) The provisions regarding contracts entered into by agents of a company in which the company is an undisclosed principal do not apply to a private company. [S.91D (19)].

(13) A private company need not file with the registrar the prospectus or a statement in lieu of a prospectus. [S. 98 (2)].

(14) The restriction as to the minimum subscription and allotment do not apply to a private company. [S. 103 (6)].

(15) It is not obligatory on a private company to send **S. 154.** to its members a copy of the balance-sheet and profit and loss account. [S. 131 (3)].

(16) A private company need not file a copy of the balance-sheet and auditors' report with the registrar. [S. 134 (3)].

(17). Auditors of a private company need not hold a certificate from the Governor-General-in-Council. [S. 164 (11)].

(18) A private company is not bound to allow the holders of preference shares and debentures to receive and inspect the balance-sheet, profit and loss account and the report of the auditors. [S. 146(1)].

One-man companies:—The privileges granted by the Act to private companies are so great that many business firms get themselves registered as private limited companies. In such companies it is usual for one member to hold the bulk of the capital in the form of fully paid shares, while the others are his nominees. One who holds the company's bulk of capital usually has the control of the management of the whole company in his hands and carries on business with limited liability. The companies so formed are perfectly lawful and it is not correct to say that the Act requires the incorporation of seven independent and *bona fide* members who have a mind and will of their own and are not the mere puppets of an individual, because the statute enacts nothing as to the extent or degree of interest which may be held by each of the members or as to the proportion of interest or influence possessed by one over the others^(q).

Conversion of a private into a public company:—There are two ways in which a private company may turn itself into a public company. The first mode is laid down in sub-section (1) and the second mode in sub-section 3 of this section. According to sub-section (1) the company has to alter its articles in such a way that they no longer include the provisions of cl. 13 of section 2(1), and the com-

(q) Salomon V. Salomon & Co. (1897) A.C. 22.

S. 154. pany shall from that date cease to be a private company. The section further provides that within fourteen days after the said date the company shall file with the registrar a prospectus or a statement in lieu of prospectus containing the particulars set out in the form marked II in the Second Schedule. If default is made, the company and every officer who is knowingly and wilfully in default shall be liable to a fine not exceeding Rs. 500.

Sub-section (3) provides that second mode in which a private company may turn itself into a public company. Where the articles of a company include the provisions of cl. 13 of section 2(1), but the company fails to observe the said provisions, the company ceases to be entitled to the privileges and exemptions conferred on private companies and becomes subject to all the obligations of a public company.

Company and ordinary partnership distinguished:—

(1) The property of a partnership belongs collectively to the members; whereas in the case of a company, it belongs to the body corporate and not to the shareholders^(r).

(2) The creditors of the partnership are also creditors of the individual partners; whereas in the case of a company, it is the company alone and not the shareholders who are liable.

(3) A partner can dispose of the partnership property as well as incur liabilities; whereas a shareholder in a company has no such power.

(4) A partner cannot contract with the firm of which he is a partner; whereas a shareholder can contract with the company^(s).

(5) Restrictions on a partner's authority are of no avail against outsiders who have no notice of the same; whereas in the case of a company such restrictions on the company's powers are perfectly valid as the documents governing the constitution of the company operate as public notice.

(r) George Newman & Co. (1895) 1 Ch. 674.

(s) Farrar V. Farrars Ltd. (1888) 40 Ch. D. 395.

(6) A company is not a mere aggregate of the shareholders, but is in law a distinct persona, distinct from the members composing it^(t); whereas a partnership is a collection of individuals and is not a legal entity recognised by law. **S. 156.**

PART V. WINDING UP.

Preliminary.

155. (1) The winding up of a company may be either—

- | | |
|---------------------|--|
| Mode of winding up. | (i) by the Court; or |
| | (ii) voluntary; or |
| | (iii) subject to the supervision of the Court. |

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes.

Modes of winding up:—Once a company has been incorporated under this Act, it can come to an end only in one of two ways (1) By the registrar striking the defunct company off the register (S. 247), (2) by winding up proceedings (Sections 155—249A).

The three different kinds of winding up dealt with by the Act are:

- (1) By the Court:
- (2) Voluntary, which may be either (a) purely voluntary or (b) under the supervision of the Court.

156. (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding	Liability as contributing of and members.
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(t) *Sa'oman V. Sa'oman & Co.* (1897) A.C. 22.

S. 156. up, and for the adjustment of the rights of the contributors among themselves, with the qualifications following (that is to say):—

- (i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;
- (ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member;
- (iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
- (iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member;
- (v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;
- (vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;
- (vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be

deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves. **S. 156.**

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

Liability as contributories, of present and past members:—No sooner a company goes into liquidation, the powers of the directors come to an end, and the company ceases to carry on business; a liquidator is appointed to collect the assets and outstandings to be applied towards the debts of the company. From the date of the winding up the members are called "Contributories", liable to contribute to the assets of the company for the payment of its debts and liabilities, the costs, charges and expenses of the winding up, and for adjusting the rights of the contributories among themselves^(u).

Sec. 158 defines the term "Contributory". It means every person who is liable to contribute to the assets of the company in the event of its being wound up, and in all proceedings for determining and in all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes also any person who is alleged to be a contributory. The holder of a fully paid share is a contributory within the meaning of the Act, as when all debts have been provided for, a call can be made on the holders of the partly paid-up shares for the purpose of adjusting the rights between them and the fully paid-up shareholders^(v). The

(u) *Webb V. Whiffin* (1872) L.R. 5 H.L. 711.

(v) *Anglesea Colliery Co.*, (1866) 1 Ch. App. 555.

S. 156. present section specifies the persons who are so liable to contribute to the assets of the company, and these include every past and present member of the company, subject to the qualifications set out in clauses (i to vii) of sub-section (1). The persons so liable are divided into two classes:—(1) The **A** contributories, being the present members of the company; and (2) The **B** contributories, being the past members of the company, who have ceased to be members within a year preceding the date of the winding up subject to the qualifications contained in sub-section (1) of sec. 156.

Liability of present members:—The liability of a present member of a company limited by shares extends to the full amount remaining unpaid on the shares held by him. A person in whose name the shares stand in the company's records is *prima facie* the **A** contributory who will be liable in respect of these shares^(w). Where, at the commencement of the winding-up of a company, a person is on the register of shareholders with his knowledge and consent, the invalidity of the contract in pursuance of which he applied for and was allotted shares is not a ground for removing his name from the list of contributories. After the winding-up his liability in respect of the shares arises *ex lege* i.e. under section 156 of the Act, and not *ex contractu*^(x). The **A** contributories are primarily liable for all the debts and liabilities of the company including the costs of the winding-up, and the calls will therefore be first made on them.

Liability of present members:—The liability of a present included persons whose shares have been transferred or extinguished by forfeiture^(y), as well as persons who have surrendered their shares to the company^(z). Past members are liable to contribute to the debts and liabilities of the company, subject to three conditions, viz. (1) that the person has only ceased to be a member within the year, (2) that the debts must have been contracted before he ceased to be a member, and (3) that the "present members" are unable to satisfy the contributions required to be made by them to dis-

(w) *Peninsular Life Assurance Co. Ltd.* (1935) 60 Bom. 297.

(x) *Hansraj Gupta V. N. P. Asthana* (1932) 60 I.A.1.

(y) *Creyke's Case* (1869) L.R. 5 Ch. App. 63.

(z) *Bath's Case* (1878) 8 Ch. D. 334.

charge the debts of the company. The call on the **B** contributories will not be made if the Court is satisfied that there are sufficient assets in the hands of the liquidators; but it will be made if there are only outstanding assets the realisation of which is doubtful both as to amount and time^(a). When the total amount of calls on past members exceeds the total amount of the debts and liabilities of the company, the surplus money must be refunded to them^(b). In estimating the debts for which the **B** contributories will be liable, all dividends in respect of these debts under the winding-up must be deducted^(c). The contributions of past members ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets for the payment of all the creditors^(d).

In the winding-up of a company limited by guarantee, a member is only liable to be placed on the list of contributories in respect of the amount which by the memorandum of association of the company he has undertaken to contribute in the event of its being wound up. Although he may be sued for sums which he is only bound to pay under the articles of association, he is not liable as a contributory in respect of such sums^(e).

157. In the winding up of a limited company any director whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company:

Liability of directors whose liability is unlimited.

Provided that—

- (i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or up-

(a) *Helbert V. Banner & Young* (1872) L.R. 5 H.L. 28.

(b) *City of London Insurance Co. Ltd.* (1932) 1 Ch. 226.

(c) *Morris's Case* (1873) 8 Ch. App. 800.

(d) *Briton Medical & General Life Assurance.* (1888) 39 Ch. D. 61; *Webb V. Whiffin* (1872) L.R. 5 H.L. 711.

(e) *Bangor & North Wales Mutual Marine Protection Association, Baird's Case* (1899) 2 Ch. 593.

S. 159. wards before the commencement of the winding up;

- (ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;
- (iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

158. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

159. (1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.

Nature of liability of contributory.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns.

Nature of liability of contributory:—This section defines the liability of a contributory, and the section lays down that this liability arises only after the commencement of the winding-up of the company. The liability of a contributory to contribute to the assets of the company is a statutory debt created by this section, and replaces the liability which existed under the articles of paying calls when duly made by the directors. The section creates a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since winding-up, but also in

respect of unpaid calls made before the date of the winding-up **S. 160.**
whether barred by limitation at that date or not^(f).

160. (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

Contributories
in case of death
of member.

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereof of the money due.

(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.

Liability of deceased member's estate:—On the death of any contributory, either before or after he has been placed on the list of contributories, his legal representatives and his heirs are put on the list of contributories as representing the deceased contributory. The representative or heir as the case may be is liable, in due course of administration, to discharge the debts of the deceased. But his liability is not personal, but extends only up to the amount of the property of the deceased which has come into his hands and has not been duly disposed of^(g). A deceased member of a limited company remains a member of a company so long as his name remains on the register without notice to the company of his death^(h).

Where a shareholder of a company which has gone into voluntary liquidation dies before the list of contribu-

(f) *Sorabji Jamshedji V. Ishwardas Jagjitwandas* (1896) 20 Bom. 654.

(g) *N. P. Mills Co. Ltd. V. Jamuna Prasad* (1933) 55 All. 417.

(h) *New Zealand Gold Extraction Co. Ltd. V. Peacock* (1894) 1 Q.B. 622.

S. 161. tories is settled, and his name is included in the said list in the liquidation proceedings, and an order is made by the Court for payment of the balance of the money due on the shares, such balance can only be recovered by adopting proceedings for the administration of the estate of the said deceased. In such cases, it is not proper to seek an order for payment personally against the legal representative of the deceased⁽ⁱ⁾. In the administration of his estate, all calls in arrear are provable as debts, and his liability for future calls may well be estimated and proved as well when the company is being wound up as when it is not^(j).

161. If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

Contributories in case of insolvency of members. (1) his assignees shall represent him for all the purposes of the winding up and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

Insolvency of contributory:—This section lays down the liability of a contributory who becomes insolvent, either before or after he has been placed on the list of contributories. In such cases, the official assignee shall represent him for all the purposes of the winding-up, and he is bound to discharge the insolvent's liabilities in due course of law. All the calls in arrear are provable as debts, and his liability for future calls may also be estimated and proved^(k). But when a member has become insolvent before the winding-up,

(i) British India Banking & Industrial Co. Ltd. (1934) 59 Bom. 558.

(j) Fuller V. McMahon (1900) 1 Ch. 173.

(k) Fuller V. McMahon (1900) 1 Ch. 173.

he cannot be placed on the list of contributories, nor can the official assignee who has succeeded to the insolvent's effects be put on the said list if the assignee has executed a disclaimer of the shares⁽¹⁾ **S. 162.**

Winding up by Court.

162. A company may be wound up by the Court—

Circumstances
in which com-
pany may be
wound up by
Court.

- (i) if the company has by special resolution resolved that the company be wound up by the Court:
- (ii) if default is made in filing the statutory report or in holding the statutory meeting:
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven:
- (v) if the company is unable to pay its debts;
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

Grounds for winding-up by the Court:—This section enumerates the several grounds on which the Court may make an order for the winding-up of a company. Where a petition for winding-up of a company compulsorily, makes allegations relating to the internal management of the company's affairs, the matter is not one that would call for the interference by the Court, but is one for the shareholders themselves to deal with. The usual ground for a creditor's petition would be that the respondent company is unable to

(1) *West of England Bank* (1879) 12 Ch. D. 288.

S. 162. pay its debts. And in such a case, the respondent company must pay the debt or submit to a winding-up order. A shareholder's petition must, as a general rule, allege one of the grounds under headings (i) to (v) or any ground which the Court is satisfied is of a like nature to that in clause (vi), and if any of those grounds are alleged, there is little doubt that the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged, the petition does not satisfy the requirements of the Act^(m).

Clause (2):—Where default has been made in filing the statutory report or in holding the statutory meeting, the Court has jurisdiction to make an order for the winding-up of the company⁽ⁿ⁾. But the petition can only be presented by a shareholder of the company, and that too only after the expiry of fourteen days after the last day on which the meeting ought to have been held. (Vide Sec. 166 (b)). Where a petition is presented on this ground, there is no absolute right to have the company wound up but the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed, or a meeting to be held, or make such other order as may be just. (Vide Sec. 77 (9)).

Clause (3):—The Court has jurisdiction to make an order for winding up a company in cases where the company has not commenced its business within one year, and where there is no probability of its commencing its business within a reasonable time^(o). But when there is a *bona fide* intention to commence business, the mere fact that it has not actually commenced the objects for which it was incorporated within a year from its incorporation is not a sufficient ground for ordering the company to be wound up^(p). The Court has full discretion in the matter, and if the suspension or non-commencement is satisfactorily accounted for and appears to be due to temporary causes the order applied for may be refus-

(m) The Pioneer Bank Ltd., (1914) 16 Bom. L.R. 508; Aryan Life Assurance Society Ltd. (1938) 40 Bom. L.R. 52.

(n) Kent Outcrop Coal Co. (1912) W.N. 26.

(o) Metropolitan Railway Warehousing Co. Ltd. (1867) 36 L.J. Ch. 827.

(p) Capital Fire Insc.Asscn. (1882) 21 Ch. 209.

(q) Murlidhar Roy V. The Bengal Steamship Co. Ltd. (1920) 47 Cal. 454.

Clause (4):—Under this clause, the Court has jurisdiction **S. 162.** to wind up a company when the number of members is reduced, in the case of a private company below two, and in the case of any other company below seven. Ordinarily, the Court leaves it to the company to wind itself up voluntarily, but where there is a conflict of interests, and matters require to be investigated, the Court will make a winding-up order^(r).

Clause (5):—See Notes under section 163.

Clause (6):—This clause gives an extensive jurisdiction to the Court to wind up a company in cases not falling under any of the preceding clauses, provided that the Court is of opinion that it is "just and equitable" that the company should be wound up. This term is not to be construed *ejusdem generis* with the preceding clauses of the section. The words are of widest significance and do not limit the jurisdiction to any particular case. It is a question of fact and each case must depend upon its own facts^(s). But it is a power which must not be acted upon unless there is a very strong ground for acting upon it. The reason being, that these companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal^(t).

Where the directors of a company had omitted to hold general meetings, or to submit accounts, or recommend a dividend, and they have laid themselves open to the suspicion that their object was to keep the petitioners in ignorance of the company's position and affairs and to acquire the petitioners' shares at an undervalue, it was held in the circumstances of the case, regard being had to the domestic character of the company, that the petitioners were entitled under that provision, to a winding-up order^(u). But the mere fact that one shareholder has a preponderating voice in the company's affairs, by reason of his owning or controll-

(r) West Surrey Tanning Co. (1866) 2 Eq. 737.

(s) Standard Aluminium & Brass Works, Ltd. (1928) 30 Bom. L.R. 1509.

(t) Longham Skating Rink, Co. (1877) 5 Ch. 669.

(u) Lock, V. John Blackwood & Co. Ltd. (1924) A.C. 783.

S. 162. ing a large number of shares, is of itself no reason for a winding-up order. When the company sought to be wound up is solvent, that the contributories only are interested in the result of the liquidation, the Court under section 174 should have regard to their wishes, ascertained by meetings convened under section 183 (2)^(v).

Under "the just and equitable" clause, winding-up orders have been made by the Court on the following grounds:—

(1) Where the substratum of the company had failed, and it had become impossible for the company to carry out the objects for which it was formed^(w).

(2) Where the capital of a private company is so owned as to make the company in substance a partnership, and one director has purported by means of irregularities to acquire complete control of the company and to exclude the other director or directors from the management of it^(x).

(3) Where the company for some time had ceased to carry on business, and the business had been carried on at a constant loss, all its capital expended and its property sold at a considerable sacrifice, and it was established that the business could not possibly be resuscitated^(y).

(4) Where a company fraudulent in its inception has lost all its capital, and was hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, it was ordered to be wound up, as that was the most effective means of recovering for the shareholders the money dishonestly retained by the promoters^(z).

(5) Where an order has been made on the company and the directors to render accounts, and the order has not been complied with^(a).

(6) Where owing to dissension between the members of a private company there was a complete deadlock in its affairs^(b).

(v) *Ripon Press & Sugar Mill Co. Ltd. V. Gopal Chetti* (1931) 58 I.A. 416.

(w) *German Date Coffee Co.* (1882) 20 Ch. D. 169.

(x) *Haven Gold Mining Co.* (1882) 20 Ch. D. 151.

(y) *Diamond Fuel Co.* (1880) 13 Ch. D. 400.

(z) *Thomas Edward Brinsmead & Sons* (1897) 1 Ch. 406.

(a) *The New Bridge Sanitary Steam Laundry Ltd.* (1917) 1 Ir. R. 67.

(b) *American Pioneer Leather Co. Ltd.* (1918) 1 Ch. 556.

(7) Where a company had been formed for the purpose of dealing in lottery bonds, and the carrying on of the business by the company had been rendered illegal^(c). **S. 163.**

(8) Where all except a small portion of the paid-up capital had been exhausted, and it was impossible for the business of the company to be carried on with any reasonable hope of success^(d).

(9) Where the company was in its inception fraudulent, was hopelessly embarrassed and was a mere "bubble" company^(e).

(10) Where the subject matter of the business for which the company was formed had substantially ceased to exist, even though a large majority of shareholders decided to continue to carry on the business of the company. Thus, where the company was formed for acquiring a gold mine in New Zealand, and it turned out that the company had no title to the mine and had no prospect of obtaining possession of it except as to a small portion for a few months a winding-up order was made^(f).

But the mere fact of there having been fraud in the promotion of the company, or fraudulent misrepresentation in the prospectus, would not in itself be sufficient to induce the Court to make a winding-up order, because the majority of the shareholders would have power at a general meeting to waive the fraud and confirm the transactions affected by it^(g). Nor will the Court make a winding-up order when there has been a mismanagement of the funds by the directors of the company in the absence of evidence to show that their mismanagement has produced insolvency^(h).

163. (1) A company shall be deemed to be unable to pay its debts—

Company when deemed unable to pay its debts. (i) if a creditor, by assignment or otherwise, to whom the company is

(c) *International Securities Corp'n. Ltd.* (1908) 90 L.T. 581; *Madras Native Permanent Fund Ltd. v. T. S. Natesa Sastri* (1929) 52 Mad. 915.

(d) *Bristol Joint Stock Bank* (1890) 44 Ch. D. 703.

(e) *London and County Coal Co.* (1866) L.R. 3 Eq. 355.

(f) *Davis & Collet Ltd.* (1935) 1 Ch. 693.; *Cuthbert Cooper & Sons Ltd.* (1937) 1 Ch. 392.

(g) *Haven Gold Mining Co.* (1882) 20 Ch. D. 151.

(h) *Ang'o-Greek Steam Navigation Co.* (1866) 2 Eq. 1.

S. 163.

debted in a sum exceeding five hundred rupees then due, has served on the company, by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred in clause (i) of the sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.

Inability to pay debts:—This section states the cases in which a company shall be deemed to be unable to pay its debts, and is explanatory of section 162 (v). The inability of a company to pay its debts is an inability to pay debts actually due, for which a creditor could claim immediate payment. The Court will not order the company to be wound up by reason of any liabilities not immediately payable, unless it is reasonably certain that the existing and pro-

able assets will be insufficient to meet the existing liabilities, S. 163. and will not in any case take into account the possible liabilities or profits which may accrue in respect of future business⁽ⁱ⁾. A petition cannot be supported on the allegation that some debt is due, if that was not the debt for which the statutory demand was made^(j). If a debt is once established it is the duty of the Court to make a winding-up order. It is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not^(k).

Clause (1):—Under this clause, if a creditor to whom a debt exceeding Rs. 500/- is then due, has served on the company a demand requiring the company to pay the said sum and the demand has not been complied with for a period of three weeks thereafter, it is proof that the company is unable to pay its debts^(l). The statutory demand under this clause is a highly formal and important document and the provisions of the Act as to its service must be strictly observed^(m).

Any creditor or contributory may take advantage of a demand requiring payment of his debt served by another creditor upon the company and the neglect of the company to pay, secure or compound for the same within the time prescribed is a foundation for a petition to wind up the company⁽ⁿ⁾.

Where a creditor's petition to wind up a company is opposed on the ground that the petitioning creditor's debt is disputed the Court will not, as a matter of course direct the petition to stand over with leave to bring an action; but is bound before doing so, to see that the debt is disputed on some substantial ground^(o):

Where there is a *bona fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, the Court will not make a winding-up order,

(i) European Life Assurance Society (1869) 9 Eq. 122.

(j) Jambad Coal Syndicate Ltd. (1935) 62 Cal. 294.

(k) Bowes V. Hope Insurance Co. (1865) 11 H.L. Cas. 389.

(l) Tulsidas V. Bharatkhand Cotton Mills (1915) 39 Bom. 47.

(m) Janbazar Manta Estate Ltd. (1930) 58 Cal. 716.

(n) The Isle of Anglesea Coal & Coke Co. Ltd. (1861) 4 L.T. 684.

(o) King's Cross Industrial Drillings Co. (1871) 11 Eq. 149.

S. 165. but will adjourn the petition till the existence of the debt is established^(p).

Clause (3):—This clause provides that a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company in fact is unable to pay its debts. For this purpose the Court shall take into account the contingent as well as the prospective liabilities of the company. A company which has sustained and is continuing to sustain heavy losses, but is still able to meet its liabilities, is not to be considered insolvent, and the Court in such a case will not make an order to wind up the company^(q). Where the uncalled capital of the company is sufficient to discharge its present, prospective, and contingent liabilities, the company cannot be considered insolvent, unless it is further shown that all or almost all its shareholders are in fact insolvent and that the company is therefore unable to realise its uncalled share capital.

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

Winding up
may be referred
to District
Court.

165. If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

Transfer of
winding up
from one Dis-
trict Court to
another.

(p) The Catholic Publishing & Bookselling Co. (1864) 2 De. G. J. & S. 116;
Tu'si'as V. Bharat Khand Cotton Mill Co. Ltd. (1915) 39 Bom. 47.

(q) Joint Stock Coal Co. (1869) 8 Eq. 146.

166. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately or by the registrar. **S. 166.**

Provisions as to applications for winding up.

Provided that—

- (a) a contributory shall not be entitled to present a petition for winding up a company unless—
 - (i) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company, below seven; or
 - (ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;
- (aa) the registrar shall not be entitled to present a petition for winding up a company—
 - (i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and
 - (ii) unless the previous sanction of the Local Government has been obtained to the presentation of the petition;

S. 106. Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held;

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of Court.

Who may petition:—This section states the persons who may present a petition for the winding-up of the company. Such a petition may be presented by:

(1) *The company:* A petition may be presented by the company through its directors in pursuance of a resolution passed by the shareholders in general meeting. The directors are not entitled, without the authority of a general meeting of the shareholders, to present a petition in the name of the company. But when the directors have presented such a petition it is open to a general meeting of the shareholders to ratify their action^(r). In actual practice however, applications by companies are very rare, for when a company is in difficulties, and the members of the company desire a winding-up, it is usual and in fact best for the company to pass a special or extraordinary resolution as the case may be, for the winding-up thereof.

(2) *Creditor or creditors:* A person to whom the company owes a debt which is actually due is a creditor of the

(r) *Galway & Salthill Tramways Co. (1918) 1 Ir. R. 62.*

company^(s). The term "creditor" means also a creditor to whom money is owed by the company, whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the company to a future time. It is by no means limited to a creditor to whom a debt is due at the date of the petition, who can demand immediate payment from the company^(t). Such a person, if he is unable to obtain payment of his debt, is entitled to present a petition to wind up the company. But a policyholder in a life assurance company cannot apply to wind up the company either as a contributory or a creditor of the company^(u). The following persons are included in the term "creditor" so as to entitle them to present a petition for winding up: (a) A secured creditor without giving up his security may present a petition^(v). (b) An assignee of a debt or a part of the debt may present a petition for winding up^(w). (c) The executor of a creditor of the company is entitled to present a winding up petition before he has obtained probate, it is sufficient if he has obtained probate before the hearing of the petition^(x). (d) The holder of debentures, the interest on which is overdue is entitled to present a petition for winding up^(y). (e) A debt due from a company under an agreement between it and its voluntary liquidator and another person is sufficient to support a petition by that person^(z). The owner of an investment bond, who upon making periodical payments to the company, will at a future date become entitled to the payment of a certain sum of money, is a "contingent or prospective creditor" of the company, and can present a petition for the winding up of the company^(a). But the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case

(s) European Life Assce. Society (1869) 9 Eq. 122.

(t) Bombay Cotton Mills Mfg. Co. Ltd. (1909) 11 Bom. L.R. 1302.

(u) Aryan Life Assce. Co. Ltd. (1938) 40 Bom. L.R. 52.

(v) Moor V. Anglo Italian Bank (1879) 10 Ch. D. 681, 689.

(w) Steel Wing Co. Ltd. (1921) 1 Ch. 349.

(x) Masonic & General Life Assurance Co. (1885) 32 Ch. D. 373.

(y) Olanthe Silver Mining Co. (1884) 27 Ch. D. 278.

(z) Bank of South Australia (1895) 1 Ch. 578 (C.A.)

(a) British Equitable Land & Mortgage Corporation Ltd. (1900) 1 Ch. 574.

S. 166. for winding up has been established to the satisfaction of the Court. (f) A judgment creditor is entitled to present a petition for winding up^(b). As a general rule, an unpaid creditor of a company is entitled to a winding up order *ex debito justitiae*^(c). But that rule is subject to exceptions, e.g., where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order^(d). The Court will have regard to the wishes of the majority in value of the creditors, and if for some good reason they object to the winding-up, the Court may in its discretion refuse the order^(e).

(3) *Contributory or contributories*: A contributory is entitled to present a winding-up petition, and this statutory right cannot be excluded or limited by the articles of association^(f). Petitions by contributories are however very rare. The Act establishes a domestic tribunal as between the members and the company and enables the members themselves by passing the requisite resolution in that behalf to determine whether there shall be a voluntary liquidation or whether the Court shall be asked to make a compulsory order^(fl). In general, a contributory has to make out a special case for a winding-up of the company^(g). In such cases, the Court must keep in view two matters. The first is the unwillingness of the Court to interfere with shareholders in the management of their own affairs, including the question whether the business shall be continued or not, and the second is, there is in fact jurisdiction in an extreme case to wind up a company at the instance of a contributory, notwithstanding that he is not supported by a large majority of the shareholders, if it is "just and equitable" that the company should be wound up^(h). The holder of a fully paid share is a contributory within the meaning of the Act, and as such entitled

(b) *Bowes V. The Hope Life Insurance & Guarantee Co.* (1865) 11 H.L.C. 389.

(c) *Amalgamated Properties of Rhodesia Ltd.* (1917) 2 Ch. 115.

(d) *Uruguay Central Rly. Co.* (1879) 11 Ch. D. 372.

(e) *Peverill Gold Mines* (1898) 1 Ch. 122.

(f) *Chapel House Colliery Co.* (1883) 24 Ch. D. 259.

(fl) *Longham Skating Rink* (1877) 5 Ch. D. 669.

(g) *Gutta Percha Corporation* (1900) 2 Ch. 665.

(h) *Standard Aluminium & Brass Works Ltd.* (1928) 30 Bom. L.R. 1509.

to present a winding-up petition⁽ⁱ⁾. But if the company is insolvent and has no assets the petition of a fully paid shareholder is liable to be dismissed^(j). A fully paid shareholder has therefore to show that there are assets to such an extent, that in the winding-up he will have an interest in those assets^(k). **S. 167.**

But a contributory shall not be entitled to present a petition for winding up a company unless:

(1) The number of members is reduced, in the case of a private company below two, or in the case of any other company below seven, or

(2) The shares in respect of which he is a contributory or some of them, either were originally allotted to him or have been held by him, and registered in his name for at least six months during the eighteen months before the commencement of the winding up or have devolved on him through the death of a former holder.

A petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting can be presented only by a shareholder; but the petition in this case can be presented only after the expiration of fourteen days after the last day on which the meeting ought to have been held. (Vide Clause (b)).

(4) *The registrar:* The registrar is entitled with the previous sanction of the Local Government, to present a petition when on the examination of the balance sheet which is required by the company to be filed with him under section 134, or from the report of an inspector appointed under section 138, he finds that the financial condition of the company is such that it is unable to pay its debts (Vide Clause (aa)).

167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

Effect of winding up order.

(i) *Anglesea Colliery Co.* (1866) 1 Ch. App. 155; *National Savings Bank Association* (1866) 1 Ch. 547; *Sabapathi Press V. Sabapathi Rao* (1930) 53 Mad. 38.

(j) *Kaslo-slocan Mining Corporation* (1910) W. N. 13.

(k) *Rica Gold Washing Co.* (1879) 11 Ch. D. 36.

1. 169. Effect on winding-up order:—The order for winding-up when made, operates in favour of all the creditors and of all the contributories as if the order were made on a joint petition of a creditor and of a contributory. The powers of the directors under its constitution to make calls *ipso facto* come to an end, and the only power to make calls is that which is given to the liquidator in the winding-up^(l).

Where a winding-up order has once been made, even though it was not justifiable at the time it was made, if there are intervening events and a lapse of time, the said order should not be disturbed, except perhaps as to costs^(m).

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.
Commencement of winding up by Court.

Commencement of winding-up by Court:—In the case of a compulsory winding-up, the winding-up dates from the presentation of the petition. Where more than one petition are presented for the winding-up of a company by the Court, the commencement of the winding-up is the date of the petition which was presented earliest. When a voluntary winding up is followed by a compulsory winding-up order, the date of the commencement of the winding-up is the date of the presentation of the petition for winding up by the Court and not the date of the resolution for voluntary winding up⁽ⁿ⁾. But for the purpose of section 230, (preferential payments) the date of the commencement of the winding-up is the date when the voluntary winding-up commenced, i.e. when the resolution for voluntary winding up was passed^(o).

169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the
Court may grant injunction.

(l) Fowler V. Broad's Patent Night Light Co. (1893) 1 Ch. 724.

(m) Ripon Press & Sugar Mill Co. V. Gopal Chetty (1932) 58. I.A. 416.

(n) Taurine Co. (1884) 25 Ch. D. 118.

(o) Indian States Bank, Ltd. (1934) 56 All. 692; Russel Hunting Record Co. (1910) 2 Ch. 78.

company, restrain further proceedings in any suit or proceedings against the company, upon such terms as the Court thinks fit. S. 170.

Restraining of proceedings against a company:—This section gives power to the Court to stay or restrain further proceedings in any suit or other proceedings against the company, in the interval between the presentation of the petition and the making of the winding-up order. The Court has power to enforce such an order when made^(p). The power given by this section is discretionary, and the Court will interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit to the exclusion of the others^(q). Thus where a proposal has been made for a scheme of reconstruction and arrangement with creditors, and the scheme was in process of preparation with a view to obtain the sanction of the Court, the Court exercised its discretion by restraining proceedings with a view to secure equal distribution of the assets among creditors of the same class^(r).

170. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

Powers of Court on hearing petition.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(3) Where the Court makes an order for the winding up of a company it shall, except where a liqui-

(p) Hope International Pulp & Paper Co. (1876) 3 Ch. D. 594.

(q) Oak Pits Colliery Co. (1882) 21 Ch. D. 322, 329.

(r) Bowkett V. Fuller's United Electric Works Ltd. (1923) 1 K.B. 160.

S. 170. dator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.

Powers of Court on hearing petition:—On hearing the petition for winding-up, the Court may dismiss it with or without costs, or may adjourn the same, or make any interim or other order that the Court deems just. No person has a right to be heard against a petition for the winding up of a company except creditors and contributories. And although the Court may reasonably hear other persons who have an interest in the property of the company as *amici curiae*, yet such persons cannot appeal from the decision^(s). A fully paid shareholder has an interest in the question whether the company should be wound up, and has the right to appear and to be heard upon an application for the winding-up of the company^(t).

Once the liability of a company for the payment of a debt is established, the creditor whose debt remains unpaid is *prima facie* entitled *ex debito justitiae* to an order for winding up^(u). But the Court has a discretion, and the petition may be stood over at the request of the company or the majority of the directors^(v). The order for winding up will not be made when it is shown that the petitioning creditor cannot gain anything by the order, and *a fortiori* it will not be made under those circumstances if the other creditors oppose it^(w). But the Court cannot refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

Sub-section (2):—Where the petition has been presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who are responsible for the default (sub-section (2)). In such a case, the Court has power instead of directing that the company be wound up,

(s) *Bradford Navigation Co.* (1870) 5 Ch. App. 600.

(t) *Badigi Kujama Collieries Ltd. V. Jagmohandas Nagar* (1930) 58 Cal. 62.

(u) *Tikan Chand V. Haris Chandra* (1930) 11 Lah. 80.

(v) *Western of Canada Oil Lands and Works Co.* (1873) 17 Eq. 1.

to give directions for the statutory report to be filed or a S. 171. meeting to be held (Vide Section 77 (9)).

Sub-section(3):—This sub-section is new and provides that when the Court makes the order for the winding-up of a company, it shall, except where a liquidator is appointed simultaneously with the making of the order, forthwith cause intimation thereof to be sent to the official receiver.

171. When a winding-up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

Suits stayed on winding up order.

Suits stayed on winding-up order:—This section provides that when a winding-up order has been made, no suit or other legal proceedings shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose. Section 232 which is supplementary to this provision enacts that in such cases any attachment, distress or execution put in force without leave of the Court against the estate or effects, or any sale held without leave of the Court of any property of the company after the commencement of the winding-up shall be void. But these sections do not apply to a voluntary winding-up; in such cases the Court has no jurisdiction to dismiss the execution case or to stay the execution^(x).

The Court will allow proceedings to be commenced or continued against a company, where they are to enforce a mortgage or charge on the properties of the company unless the liquidator is prepared to pay off the mortgagee's claim without any proceeding in Court^(y). The Court will similarly allow proceedings for rescission and rectification of the register, instituted before the company went into a compulsory winding-up^(z). After the date of the winding-up order a creditor is not allowed to change his position from that of an

(x) Jyotiprasad Singh Deo V. Patmohana Collieries Ltd. (1931) 58 Cal 913.

(y) Lloyd V. Lloyd & Co. (1877) 6 Ch. D. 339.

(z) Marwar Bank V. Panna Tal (1915) P.R. N-31 at P. 158.

S. 171A. unsecured creditor to that of a secured creditor; consequently a suit for the specific performance of such a contract will be refused^(a).

171A. (1) For the purposes of this Act, so far as it relates to the winding-up companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or, if there is no such official receiver, then such person as the Local Government may, by notification in the local official Gazette, appoint for the purpose.

Vacancy in the office of liquidator.

(2) On the making of a winding-up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix.

Vacancy in office of liquidator:—Under section 170(3), it has already been seen that where the Court makes a winding-up order and no liquidator is appointed simultaneously, intimation thereof shall forthwith be given to the official receiver. This section provides that when such an intimation has been given, the official receiver automatically becomes the official liquidator, and no separate order appointing him is necessary. Similarly when a vacancy occurs in the office of official liquidator who has been appointed by the Court, section 176 (2) provides that the official receiver shall act as official liquidator until the vacancy is filled up by the Court.

The official receiver acting as such official liquidator, shall take into his custody and control all the assets of the company and all the books and documents of the company

(a) *Bank of Scotland V. MacLeod* (1914) A.C. 311; *Maneklal V. Saraspur Mfg. Co. Ltd.* (1927) 29 Bom. L.R. 253.

as relate to its management and business^(b). The official liquidator is an officer of the Court, he is practically in the position of a receiver appointed by the Court, and it is a contempt of Court for anyone to interfere in any way with his possession without the leave of the Court first obtained^(c). Under section 80 of the Civil Procedure Code 1908, he is entitled to a period of two months notice for any suit intended to be filed against him. He is entitled to such remuneration as the Court shall fix.

172. (1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order.

Copy of winding up order to be filed with registrar.

(2) On the filing of a copy of a winding-up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the local official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.

Copy of winding up order to be filed with registrar:—

This section casts a duty on the petitioner as well as on the company to file with the registrar a copy of the winding-up order within one month from the date of the making of the order. An order for the winding-up of a company is notice of discharge to the servants of the company^(d). But if the business of the company is continued after the commencement of the winding-up, and the former servants are actually employed, it is on the basis of a new contract between the liquidator and the servants and notice of discharge must be given pursuant thereto^(e). This rule does not apply where the liquidator does not continue the business, but merely employs the servants in analogous positions with a

(b) *Engel V. South Metropolitan Brewing Etc., Co.* (1892) 1 Ch. 442.

(c) *Henry Pound, Son, & Hutchins* (1889) 42 Ch. D. 402, 411.

(d) *Chapmen's Case* (1866) 1 Eq. 346.

(e) *English Joint Stock Bank, ex-parte Hardings* (1866) 3 Eq. 341.

- S. 174.** view to reconstruction^(f). A resolution for the voluntary winding-up of a company does not operate as a notice of discharge to the servants of the company^(g).

173. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Power of Court to stay winding up.

Power of Court to stay winding up proceedings: The Court has power to stay proceedings in a winding-up with a view to the continuance of the company for the purpose of resumption of business, where it is shown that the company's debts have been paid off, and there is sufficient money in the hands of the official liquidator to meet the arrears of current expenses^(h). But the Court may, in such cases impose such terms and conditions as to the Court may seem just⁽ⁱ⁾. A reduction, re-organisation and increase of capital with a view to continuing to carry on the business of a company, can be directed by the Court, while the company is in voluntary liquidation, and all further proceedings in the voluntary winding-up stayed^(j). In the exercise of its jurisdiction to stay proceedings, the Court should consider not only what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large^(k). The provisions of the section apply to all kinds of winding up, whether compulsory, voluntary or under supervision.

Court may have regard to wishes of creditors or contributories.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or

(f) *MacDowall's Case* (1886) 32 Ch. D. 366.

(g) *Midland & Counties District Bank, Ltd. v. Attwood* (1905) 1 Ch. 359.

(h) *South Barrule State Quarry Co.* (1869) 8. Eq. 608.

(i) *SS. Chigwell Ltd.* (1888) 4 T. L.R. 308.

(j) *Stephen Walters & Sons Ltd.* (1927) 70 Sol. Jo. 953; *Steamship Titian Co. Ltd.* (1888) 58. L.T. 178.

(k) *Telescriptor Syndicate Ltd.* (1903) 2 Ch. 174.

contributories as proved to it by any sufficient evidence. **S. 175.**

Official Liquidators.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons other than the official receiver to be called an official liquidator or official liquidators.

Appointment of
official liquidator.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

Official liquidator: His status and duties:—When a company goes into liquidation, the powers of the directors come to an end, and the company ceases to carry on business; a liquidator is appointed to collect the assets and outstandings

S. 175. of the company to be applied towards payment of its debts. A liquidator though in some respects a trustee, is a paid agent bound to discharge his duties with reasonable care and skill, and may be deprived of costs for a mistake which would not be sufficient to disentitle an ordinary trustee to his costs⁽¹⁾. He stands in a fiduciary position to the company of which he is appointed liquidator. If while so acting he incurs loss by acting wrongly, although he may have acted honestly, the Court will decline to hold either that he has acted reasonably or that he ought fairly to be excused for the breach of trust^(m). He is under a statutory duty to pay off the debts of the company, and then distribute the surplus among the shareholders⁽ⁿ⁾. He is not entitled to make profits by reason of his position as liquidator. Thus, where he sells the undertaking of the company nominally to a new company, but really to himself, the same will be set aside on the ground of concealment, and the property will be ordered to be reconveyed to the old company^(o).

He is in the position of a receiver or manager of partnership assets appointed by the Court. He should have no leaning for or against any individual whatever. It is his duty to the whole body of shareholders and to the whole body of creditors, and to the Court, to make himself thoroughly acquainted with the affairs of the company; to suppress nothing and to conceal nothing which has come to his knowledge in the course of his investigation which is material to ascertain the exact truth in every case before the Court^(p). It is his duty to act with complete impartiality between the contending shareholders^(q). He is in no better position than the company would have been, and is not entitled to put on the list of contributories a person whom the company itself could not have put on the register of members, as in cases where although a person has agreed to be a member, the company has not put his name on the register

(1) *Silver Valley Mines* (1882) 21 Ch. D. 381.

(m) *Windsor Steam Coal Ltd.* (1929) 1 Ch. 151.

(n) *Knowles v. Scott* (1891) 1 Ch. 717.

(o) *Silvertone & Haigh Moor Coal Co. v. Edey* (1900) 1 Ch. 167.

(p) *Contract Corporation, Gooch's Case* (1872) 7 Ch. App. 207.

(q) *Ripin Press & Sugar Mill Co., Ltd. v. Gopal Chetti* (1931) 58 I.A. 416.

for a period of five years^(r). He is an officer of the Court, and it is therefore a contempt of Court for any one to interfere with his possession without the leave of the Court^(s). He is also an agent of the company; thus, where he performs a contract of the company without disclaimer or purports to make a new contract on its behalf, there is no presumption that he does so in his personal capacity, even though he does not describe himself as liquidator^(t). **S. 176.**

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

**Resignations,
removals, filling
up vacancies
and compensa-
tion.**

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court and until the vacancy is so filled up the official receiver shall be and act as the official liquidator.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remunerations shall be distributed amongst them in such proportions as the Court directs.

Appointment and removal of liquidator:—In the appointment of a liquidator, the Court generally has regard to the wishes of the creditors and contributories. The person proposed to be official liquidator by the person who obtained the winding up order ought to be appointed in preference to any other person, unless there is a strong feeling against him, or some reason to doubt his fair conduct^(u).

Where the Court is satisfied on the evidence that it is desirable in the interests of all those interested in the assets that a particular person shall not manage the assets, the Court has power to remove him without there being shown in him any personal misconduct or unfitness^(v). Under

(r) *Whiteley's Case* (1889) 60 L.T. 807.

(s) *Henry Pound, Son & Hutchins* (1889) 42 Ch. D. 402 at P. 411.

(t) *Stead Hazle & Co. V. Cooper* (1933) 1 K.B. 840.

(u) *Albert Average etc. Association* (1870) 5 Ch. App. 597.

(v) *Rubber & Produce Investment Trust* (1915) 1 Ch. 382.

177A. section 207 (9), the Court has the power in the voluntary winding up of a company, on cause shown, to remove a liquidator. This jurisdiction is not confined to cases where there is personal unfitness in the liquidator. The cause shown for his removal is to be measured by the real, substantial, and honest interest of the liquidation, and to the purpose for which the liquidator is appointed^(w).

Provisional liquidator; Clause (2):—The Court may appoint a provisional liquidator at any time after the presentation of the petition and before the making of the winding up order. The object of appointing a provisional liquidator is to protect the property of the company, to keep things in *status quo*, and to prevent any person getting priority over others^(x). But before making any such appointment the Court should give notice to the company, unless the Court sees reason for dispensing with the notice.

Official liquidator. **177.** The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

177A. (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:—

Statement of affairs to be made to the liquidator.

- (a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;
- (b) the debts and liabilities;
- (c) the names, residences and occupations of the creditors stating separately the

(w) *Kaikhurusu N. Chandabhoy V. Tata Industrial Bank, Ltd.* (1924) 48 Bom. 471.

(x) *Dry Docke Corpn. of London* (1888) 39 Ch. D. 306 at P. 309 and 314.

amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given; S. 177A

- (d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary, manager or other chief officer of the company, or by such of the persons hereinafter in this sub-section mentioned as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

- (a) who are or have been directors or officers of the company;
- (b) who have taken part in the formation of the company at any time within one year before the relevant date;
- (c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required;
- (d) who are or have been within the said year officers of or in the employment of a company, which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

S. 177A2

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person without reasonable excuse, and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly.

(8) In this section the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and, in a case where no such appointment is made, the date of the winding up order.

Statement of affairs to official liquidator:—This section and the next have been inserted by the Amendment Act of 1936. Where the Court has made a winding-up order, or appointed an official liquidator provisionally, there shall be submitted to the registrar within twentyone days from the said date (unless the Court thinks fit to order otherwise) by the director, secretary or other officer of the company, or by any person in the employment of, or who has taken part in the for-

mation of the company, a statement as to the affairs of the company verified by affidavit and containing the particulars specified in sub-section (1). The persons making the statement and affidavit are entitled to be paid out of the assets of the company the cost incurred in the preparation thereof. The said statement shall be open to the inspection of the creditors and contributories of the company at all reasonable times, on payment of the prescribed fee, and to obtain a copy thereof or extract therefrom. A person untruthfully stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly.

177B. (1) In a case where a winding up order made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177A, and not later than four, or with the leave of the Court, six months from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

Statement by
liquidator.

- (a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of—
 - (i) cash and negotiable securities;
 - (ii) debts due from contributories;
 - (iii) debts due to and securities, if any, available to the company;
 - (iv) movable and immovable properties belonging to the company;
 - (v) unpaid calls; and
- (b) if the company has failed, as to the causes of the failure; and

S. 178. (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court.

Preliminary report by official liquidator:—As soon as practicable after receipt of the statement submitted under section 177A, and not later than four, or with the leave of the Court six months from the date of the order, the official liquidator shall submit a preliminary report to the Court containing the various particulars specified in sub-section (1). He may also, if he thinks fit make a further report stating whether in his opinion any fraud has been committed by any person in the formation or promotion of the company, or by any director or other officer of the company in relation to the company since the formation thereof, in order to enable the Court, if it thinks fit, to make an order for the public examination of such person. The report of the liquidator must state facts showing a basis for the official liquidator's opinion, and warranting the judge in calling upon the person implicated for an explanation^(y).

178. (1) The official liquidator whether appointed provisionally or not shall take into his custody, or under his control, all the property, effect and actionable claims to which the company is or appears to be entitled.

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as

(y) Civil, Naval & Military Outfitters Ltd. (1899) 1 Ch. 215.

from the date of the order for the winding up of the company. **S. 178A.**

Custody of company's property:—The mere fact that a winding up order has been made does not vest the company's property in the official liquidator, unless and until a vesting order is made. It is important to bear in mind that under this Act winding up, whether voluntary or by the Court, does not effect a *cessio bonorum*, as does a bankruptcy, but the company's property remains vested in it as before⁽²⁾.

178A. (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed.

Committee of
Inspection in
compulsory
winding up.

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

S. 178A. (5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

Committee of inspection:—This section is new, and provides for the appointment of a committee of inspection which

shall consist of not more than twelve members being creditors and contributories of the company. The said committee may be appointed at a meeting of the creditors of the company convened by the official liquidator within one month from the date of the order for the winding up. The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times. In the administration of the assets of the company and in the distribution thereof among the creditors, the official liquidator shall have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection. (S.183 (1)).

The function of the committee of inspection is to assist the official liquidator. It is the duty of the liquidator not to obtain the leave of the Court for the appointment of a solicitor or take any other step to which he knows that the committee of inspection will object^(a). The Court however is not bound by the decision of the committee^(b).

179. The official liquidator shall have power, with the sanction of the Court, to do the following things:—

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company:—

Powers of official liquidator.

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same;

(c) to sell the immovable and movable property of the company by public auction or private contract, with power to trans-

(a) Consolidated Diesel Engine (1915) 1 Ch. 192.

(b) North-Eastern Insurance Co. (1915) W.N. 210.

S. 179.

- fer the whole thereof to any person or company, or to sell the same in parcels;
- (d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;
 - (e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other creditors;
 - (f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;
 - (g) to raise on the security of the assets of the company any money requisite;
 - (h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself: Provided that nothing

herein empowered shall be deemed to **S. 179.**
affect the rights, duties and privileges
of any Administrator General.

- (i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Powers of official liquidator:—This section sets out the powers of the official liquidator which he can exercise only with the sanction of the Court. But the Court may under section 180 provide by any order that the official liquidator may exercise any of the said powers without the sanction or intervention of the Court.

Clause (a):—This clause enables the official liquidator to sue provided he does so in the name of the company. Any costs incurred by the liquidator must come out of the assets of the company. Where he sues in the name of the company but fails in the suit, the Court has no power to order him to pay the cost personally. But if he sues in his own name, he may be ordered personally to pay costs. In the latter case he has a right to claim an indemnity from the estate of the company. If the official liquidator fails in the action, he must not appeal without the permission of the Court; if he appeals without permission he becomes personally liable for the costs^(c). In the exercise of his powers, he is entitled to refer to arbitration any matter in dispute in which the company that he represents is interested^(d).

Clause (b):—The official liquidator has power to carry on the business of the company, only so far as may be necessary for the beneficial winding up of the same. The costs of carrying on the business are not payable out of any mortgaged property in priority to debentures as costs of preservation, and subject to the costs of realising the property, the fund belongs to the debentureholders in priority to liquidator's costs so incurred^(e). In carrying on the business of the com-

(c) *Blimoria V. Mrs. De Souza* (1927) 8 Lah. 549.

(d) *Sitaram Balmukund V. The Punjab National Bank, Ltd.* (1936) 17. Lah. 722.

(e) *Regents Canal Iron Works Co.* (1875) 3. Ch. 411.

S. 181. pany, he has no power to raise money on the property of the company to the prejudice of the mortgagees^(f).

The official liquidator is not entitled to disclaim any property to the prejudice of a third party. Thus, a liquidator will not be allowed to disclaim so as to affect the right of a landlord to sue a third party for the amount of the rent on a contract of guarantee^(g).

180. The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

Discretion of
official liquidator.

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties: Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

Provision for
legal assistance
to official liquidator.

Legal assistance to liquidator:—The sanction given to the liquidator to take proceedings does not dispense with the necessity for obtaining sanction to the appointment of a particular solicitor, advocate or pleader^(h). In proceedings for liquidation of a company, the attorney for the petitioning creditor should ordinarily be employed as attorneys for the official liquidator, and that rule applies with greater force where the proceedings are complicated and the petitioning creditors' attorneys are acquainted with the proceedings, and a new firm of attorneys would require considerable time and labour in becoming familiar with them⁽ⁱ⁾. But the solicitor appointed by the liquidator has no claim against the liquida-

(f) Motilal Shival V. The Poona Cotton & Silk Mfg. C. Ltd. (1917) 42 Bom. 215.

(g) Katherine et Cie (1932) 1. Ch. 70.

(h) London Metallurgical Co. (1897) 2 Ch. 262.

(i) Jamnadas Nursey Ginning & Pressing Co. Ltd. (1935) 37. Bom. L.R. 401.

tor personally for the cost of the winding-up. He gives **S. 182.** credit to the assets of the company, and if they are insufficient he must lose the difference^(j).

There is a fiduciary relationship between the liquidator on the one side and the shareholders or creditors of the company on the other. The liquidator therefore cannot receive remuneration beyond what is allowed by statute or rules, even though being a solicitor, he conducts proceedings on behalf of himself and his co-liquidator in the process of winding-up^(k).

182. (1) The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court.

(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator.

(j) *Maneklal Mansukhbhai V. The Suryapur Mills Co. Ltd.* (1928) 52 Bom. 477; *Anglo-Moravian Etc. Rly. Co.* (1875) 1 Ch. D. 130.

(k) *Gertzenstein Ltd.* (1937) 1 Ch. 115.

183. (5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested.

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

Exercise and control of liquidator's powers.

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

*Ordinary Powers of Court.***S. 184.**

184. (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

Settlement of list of contributories and application of assets.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

Settlement of list of contributories:—After making a winding-up order, the Court settles a list of contributories which must distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of, or liable for the debts of others. The list of contributories consists of the "A" list of present members and the 'B' list of past members being persons who have ceased to be members within a year of the commencement of the winding-up. The "A" list will be settled as soon as may be after the winding-up order is made, but the 'B' list will be prepared only if it is shown that the existing members are unable to satisfy the debts of the company. The word "contributory" is not limited to persons who owe money to the company in respect of their shares, but unless such a shareholder is for the time being settled on the list of contributories, the Court has no jurisdiction to make an order against him⁽¹⁾. A person in whose name the shares stand in the company's records is *prima facie* the contributory who is liable in respect of those shares^(m). The Court hears any objections which may be urged by any contributory, but when the list is once settled, it becomes conclusively binding

(1) *Aidall Ltd.* (1933) 1. Ch. 325.

(m) *Peninsular Life Assurance Co. Ltd.*, (1936) 60. Bom. 297.

S. 185. on every person whose name is settled therein, subject to the result of any appeal which may be preferred by him within the time allowed by the rules⁽ⁿ⁾.

When a person disputes his liability to be put on the list of contributories and fails, he must, except under every special circumstances, be made to pay the costs of the contest^(o).

Rectification of register:—The power of the Court to rectify the register of members under section 38 can also be exercised when the company has gone into liquidation. On an application to rectify the register, the Court will have regard to who is the applicant and to all the facts and circumstances of the case. And where owing to the default of the company, a transfer has not been registered before the winding-up, the Court will not rectify the register on the application of the official liquidator, whatever may be the right of the transferor to have it rectified. The reason is that the liquidator in such a case represents only the company to whose default the error is owing, and the creditors have no direct equity against a person whose name has never been held out to them^(p). Where there has been a transfer of shares after a company has gone into liquidation, the Court has power to order the rectification of the register by the insertion of such transferee's name, but the exercise of the power is discretionary and the order will not be made except on strong grounds^(q). After a company goes into liquidation, a member is not entitled to have his name removed from the register of shareholders on the ground that he was induced to take shares by misrepresentation^(r), unless he had already commenced proceedings for that purpose before the company went into liquidation^(s),

185. The Court may, at any time after making a winding-up order, require any contributory for the

(n) *Hansraj V. Asthana* (1932) 54 Ail. 827.

(o) *Peninsular Life Assurance Co. Ltd.* (1935) 60. Bom. 297.

(p) *Joint Stock Discount Co.* (1867) 3 Ch. 119.

(q) *Onward Building Society* (1891) 2. Q.B. 463.

(r) *Kushi Nand V. The People's Bank of Northern India Ltd.* (1936) 17. Lah 793.

(s) *Reese River Silver Mining Co. V. Smith* (1869) L.R. 4. H.L. 64.

Power to require delivery of property.

time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the

Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

Delivery of property to official liquidator:—This section empowers the Court to direct any of the persons specified in the section being its officers or contributories to pay, deliver, surrender or transfer to the liquidator any money, property or documents to which the company is *prima facie* entitled. But if a dispute is raised as to whether the company is entitled or not, there is nothing in the section empowering the Court or the liquidator to determine that question, and the Court will not make an order for delivery over of the money or goods as the case may be^(t).

The section applies only to the persons mentioned therein. The Court has therefore no jurisdiction to make an order requiring a creditor to repay back to the company money in cases where he has obtained payment of money of the company under a garnishee order^(u).

186. (1) The Court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

Power to order payment of debts by contributory.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on

(t) *Palace Restaurant Ltd.* (1914) 1, Ch. 493.

(u) *United English & Scottish Assurance Co.* (1867) 3, Ch. App. 787.

S. 186. any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Power to order payment of debt by contributory:—This section confers a summary jurisdiction on the Court by enabling it to make an order on any contributory settled on the list of contributories, to pay to the company any money due from him or from the estate of the person whom he represents, exclusive of any money payable by him by virtue of any call in pursuance of the Act. An order made by the Court under this section is called a "balance order". A balance order made under this section may, by virtue of section 199 be enforced in the same manner as a decree.

But the Court has no power on an application under this section to order a contributory in a winding-up to pay a debt if a suit by the company instituted at the date of the application would have been time-barred. In those circumstances the debt is not "money due", within the meaning of the section; the section leaves open any defence which would have been open in a suit by the company^(v). The power given by the section is discretionary, and the Court may in a proper case, if so advised, direct the liquidator to file a regular suit against the contributory^(w).

Set-off by contributories:—A shareholder who is also a creditor of the company under a contract is not, in the event of the company being wound up entitled to set-off the debt due to him against the calls, nor to set-off against the

(v) *Hansraj Gupta V. Dehra Dun Mussorie Electric Tramway Co. Ltd.* (1932). 60. I.A. 13.

(w) *Kanta Prasad V. Industrial Bank of India* (1915) P.R. No. 59.

calls a dividend which may hereafter come to him^(x). But a contributory who has bought up a debt of the company for a less sum than is actually due thereon, may prove against the company for the full amount of the debt and not merely for what he has paid^(y). **S. 186.**

Where a company while a going concern sues a shareholder for a call, and he sets up the defence of set-off, and before judgment is obtained a winding of the company commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the company to the shareholder cannot be set-off in proceedings in the winding-up to obtain payment of the call^(z). A partner in a firm to whom a debt is owing by the company is not entitled to claim a set-off against a debt to the company due by himself and the other partners in the firm jointly^(a). Similarly in an action by a company in liquidation for a call made before liquidation, the defendant has no right of set-off in respect of sums alleged to be due to him, from the company^(b).

Sub-section (2) of the present section contains two provisions for allowing a set-off. They are:—

(1) In the case of an unlimited company, the Court may allow to any contributory, and in the case of a limited company to the directors thereof whose liability is unlimited, the right to set-off any money due to him or to the estate which he represents, from the company on any independent dealing or contract with the company, against any debts due from the contributory or director to the company and calls made before the winding up. But the right of set-off cannot be exercised against any money due to the contributory as a member of the company in respect of any dividend or profits due to him from the company. Until the company's debts are paid in full, a contributory has no right of set-off against calls made in the winding-up^(c).

(x) *West of English & South Wales District Bank* (1879) 48. L.J. Ch. 463.

(y) *Humber Ironworks Co.* (1869) 8 Eq. 122.

(z) *Hiram Maxim Lamp Co.* (1903) 1. Ch. 70.

(a) *Penington & Owen Ltd.* (1925) 1. Ch. 825.

(b) *Alliance Film Corporation V. Knowles* (1927) 43. T.L.R. 678.

(c) *West of England Bank* (1879) 48. L.J. Ch. 463.

S. 187. (2) The second provision is contained in the proviso to sub-section (2) which lays down that in the case of any company whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call when adjusting the rights of the contributories among themselves. Upon payment of all calls which have become due, the contributory is entitled to receive dividends at the same time and at the same rate with the other creditors^(d).

Set-off by creditors:—Where there are mutual debts and credits or mutual dealings between the company and any other person, an account is taken between them, and only the balance due can be proved for, if the company is insolvent^(e). A contributory who is also a creditor of the company is not entitled to set-off his debt against the call made on him by the liquidator,^(f) until all the other creditors of the company have been paid in full. This rule applies even though there might have been an agreement between him and the company that there shall be a right of set-off^(g). In like manner, the estate of a deceased insolvent contributory cannot be allowed to set-off a debt due to the estate from the company against a debt due to the company in the liquidation^(h), the principle of the decision being that where a person is entitled to participate in a fund to which he is also bound to contribute, he is not entitled to participate in it unless and until he has made his contribution.

187. (1) The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability,

Power of Court to make calls.

(d) *Overend, Gurney & Co.* (1866) 1. Ch. App. 528; *Whitehouse & Co.*, (1878) 9. Ch. D. 595.

(e) *Mersey Steel & Iron Co.* (1884) 9. A.C. 434.

(f) *General Ironworks* (1879) 12 Ch. D. 755.

(g) *Law, Car and General Corporation* (1912) 1 Ch. 405.

(h) *Peruvian Railway Construction Co.* (1915) 2. Ch. 144.

for payment of any money which the Court considers **§ 187.** necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

Power of Court to make calls:—This section vests in the Court a summary jurisdiction to make calls on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability. The making of a call is within the discretion of the Court. The call will not be made if the Court is satisfied that there are sufficient assets in the hands of the liquidators. But it will be made if there are only outstanding assets the realization of which is doubtful both as to amount and time⁽ⁱ⁾. An order made under this section is called a balance order and may by virtue of section 199 be enforced in the same manner as a decree.

The Court cannot empower anyone except the liquidator to make calls on the contributories^(j). Although a call which was made by the company before the winding-up has become time-barred, the liquidator is entitled to enforce the liability not only in respect of calls made since the winding-up, but also in respect of unpaid calls made before the date of the winding-up, whether barred by limitation or not. The reason is that under section 159 (1) the liability of a contributory creates a debt at the time specified in the calls made on him by the liquidator^(k). But the liquidator is not bound to resort to the remedy by balance order, and may bring a regular suit to recover the amount of the call money^(l).

Calls on shares:—A shareholder in a company is under a liability to pay the amount on his shares, but only in accordance with the terms of the articles. He is not bound to pay the whole amount at once unless the terms of the issue so

(i) *Helbert V. Banner & Young* (1872) L.R. 5. H.L. 28.

(j) *Fowler V. Broad's Patent Night Light Co.* (1893) 1. Ch. 724.

(k) *Sorabji Jamshedji V. Ishwardas Jagjiwandas* (1894) 20. Bom. 654.

(l) *Westmoreland Slate Co. V. Fielden* (1891) 3. Ch. 15.

S. 187. provide^(m). The call is made by the directors or under their authority in pursuance of provisions in the articles.

In making a call great care must be taken to see that the directors who make the call,

- (1) are duly qualified⁽ⁿ⁾;
- (2) are duly appointed^(o);
- (3) the meeting of the directors at which the call was resolved on has been duly convened^(p);
- (4) the proper quorum of the directors is present at the meeting^(q); and
- (5) the resolution is duly passed and sets out the amount of the call as well as the time and place for payment, and the person to whom the call is to be paid^(r).

If all these matters are not complied with, the call made is invalid, for when the company seeks to enforce the call any initial irregularity may vitiate the proceedings.

Call-making power a trust:—The power of making calls is in the nature of a trust and must be exercised for the benefit of the company^(s). If it is exercised for some indirect purpose or *malafide* it is an abuse of power and the Court will grant an injunction restraining the call^(t). The call should be made on all the shareholders and a call made on some members only to the exclusion of the others is *prima facie* invalid, unless the articles give such a power^(u). It is competent to the directors to allow a shareholder to pay up the call in instalment even though there is no such express authority in the articles^(v). When a call is made, it is the duty of the directors to enforce the payment thereof and if they fail they will be guilty of a breach of duty^(w). Where the call is made for the purpose *ultra vires* or the call is illegal the

(m) *Alexander V. Automatic Telephone Co.* (1900) 2. Ch. 56.

(n) *Sharp V. Dawes* (1876) 2. Q.B.D. 26.

(o) *Howbeach Coal Co. V. Teague* (1860) 29.L.J. Ex. 137.

(p) *Faure Electric Accumulator Co. V. Phillipart* (1888) 58. L.T. 525.

(q) *Phosphate Lime Co.* (1871) 24. L.T. 932.

(r) *Cawley & Co.* (1889) 42. Ch. D. 209.

(s) *Gilbert's Case* (1870) 5. Ch. App. 559.

(t) *Jones V. Pacaya Rubber Etc. Co.* (1911) 1 K.B. 455.

(u) *Galloway V. Halle' Concerts Society* (1915) 2 Ch. 233.

(v) *Lawrence V. Wynn* (1839) 15. M. & W. 355.

(w) *Spackman V. Evans* (1868) 3. H.L. 186.

Court will, even at the instance of a minority of shareholders **S. 187.** interfere by injunction to prevent the directors from enforcing the call^(x).

Forfeiture of shares:—In the absence of a power in the articles a company has no inherent power to forfeit the shares of any member^(y). The power exists only where it is given by the articles^(z). The articles of a company usually contain a clause empowering the directors to forfeit the shares of a member if default is made in the payment of calls. The Act in clauses 24 to 30 in Table 'A' recognises forfeiture. The power of forfeiture when it exists can only be exercised for non-payment of a call. The exercise of a right is a question of expediency as to which the directors must exercise their own discretion^(a). It must be exercised for the benefit of the company. It is the duty of the directors only when payment cannot be obtained to exercise the power of forfeiture that is given to them^(b). Even though an article says that on non-payment shares shall be *ipso facto* forfeited, the forfeiture is ineffectual unless and until the directors in fact declare a forfeiture^(c).

Forfeiture is strictissimi juris:—Where a power to forfeit exists in the articles, it must be treated as *strictissimi juris* and those who seek to enforce it must pursue exactly all that is necessary in order to enable them to exercise this strong power^(d). Even a little inaccuracy in complying with all the conditions precedent to the exercise of the right is as fatal as the greatest. Thus, if a call in respect of which forfeiture is effected is not validly made, or if the notice on which the forfeiture is based is inaccurate in that it requires payment of interest from a wrong date the forfeiture will be held to be invalid^(e). Where the company relies upon the forfeiture as being valid, it is bound to show that all conditions precedent to the exercise of the right have been accurately per-

(x) *Galloway V. Halle' Concerts Society* (1915) 2. Ch. 233.

(y) *Clarke V. Hart* (1858) 6. H.L.C. 633.

(z) *Dawkins V. Antrobus* (1881) 17. Ch. D. 615.

(a) *Bigg's Case* (1865) 1. Eq. 309.

(b) *Richmond's Case* (1858) 4. K. & J. 305.

(c) *Moore V. Rawlings* (1859) 6. C. B.N.S. 289.

(d) *Knight's Case* (1867) 2. Ch. App. 321.

(e) *Johnson V. Lyttle's Iron Agency* (1877) 5. Ch. D. 687.

S. 187. formed.^(f) and if it fails to do so, the Court will declare the forfeiture invalid. The forfeiture must be carried out by properly qualified and appointed directors, and the due quorum must be present^(g). Where the shares are invalidly forfeited the shareholder will remain a member of the company irrespective of the question of lapse of time^(h). Where a resolution is passed forfeiting the shares of any member, the company has no authority to reinstate him to the register without his consent⁽ⁱ⁾. Once a share has been validly forfeited by the company before the winding-up, the liquidator has no power to cancel the forfeiture^(j). When a company goes into a voluntary winding-up the directors can exercise the power of forfeiture on obtaining the sanction from the liquidator^(k).

Invalid forfeiture:—A forfeiture of the shares of a member for enforcing a lien irrespective of debts due from him generally (as distinct from calls) is invalid, and the holder continues a member of the company^(L). The power cannot be exercised with a view to getting rid of an obnoxious member, or with a view to relieve a shareholder of his liability with respect to the unpaid share capital^(L1). An article which authorises the company to forfeit the share of any member who commences proceedings against the company or the directors is invalid^(L2). Similarly, the forfeiture of the shares of a member who alleged that he was entitled to repudiate his shares was held to be invalid^(L3). In cases where an invalid forfeiture is threatened or intended, an injunction may be granted restraining the company from exercising the right of forfeiture^(L4). But where a forfeiture has been properly and *bona fide* effected the Court will not relieve against

(f) *Jones V. V.N. Vancouver Land Co.* (1910) A.C. 317.

(g) *Bottomley's Case* (1881) 16. Ch. D. 684.

(h) *Beilerby V. Rowland Marwood's Steamship Co.* (1902) 2. Ch. 14.

(i) *Laikworthy's Case* (1903) 1. Ch. 710.

(j) *Dawe's Case* (1868) 6. Eq. 232.

(k) *Fairbairn Engineering Co.* (1893) 3. Ch. 450.

(L) *Hopkinson V. Mortimer & Co.* (1917) 1 Ch. 646.

(L1) *Spackman V. Evans* (1868) L.R. 3 H.L. 186.

(L2) *Hope V. International Financial Society* (1877) 4 Ch. D. 327.

(L3) *Gower's Case* (1876) 6 Eq. 77.

(L4) *Sparks V. Liverpool Waterworks* (1807) 13 Ves. 428.

(L5) *Watson V. Eales* (1856) 23 Beav. 294.

Consequences of forfeiture:—When shares are once forfeited, they may be re-issued as paid up to an amount not exceeding the amount paid by the previous holder, and may be re-issued for a sum less than the sum which is credited as paid on them^(L6). The purchaser of a forfeited share is liable to pay calls to an amount remaining unpaid on the share, including the amount of the call unpaid for which the forfeiture was effected^(L7). But where the company recovers the amount of the call from the forfeited member, the new holder of the share is entitled to credit for that amount^(L8). In the absence of a provision in the articles enabling the company to recover the amount of the calls from the forfeited member there is no right to recover such calls by an action at law^(L9). Where shares have been forfeited, a payment made by a purchaser from the company after forfeiture, of sums for which the former holder remains liable under the articles, operates in relief of the purchaser^(L10). Where a winding-up commences within a year of the forfeiture, the forfeited member is liable to be put on the "B" list of contributories^(L11). But where a person has by misrepresentation been induced to take shares in a company and is sued for the amount of the calls after the forfeiture, he is entitled to set up the misrepresentation as a bar to the action^(L12).

Surrender of shares:—The Act contains no provisions as to surrender of shares. A surrender of shares to a company operates as a reduction of share capital which is illegal unless the other provisions of the Act namely section 50, 54 and 55 are complied with. A surrender of shares which are liable to be forfeited as a short-cut to forfeiture is perfectly valid, but a surrender for which the company gives any consideration is invalid. A surrender of partly-paid shares to the company is invalid, as this involves a release of the uncalled liability^(L13). In such a case even after the lapse of

(L6) *Morrison V. Trustees' Corporation* (1898) 79 L.T. 605.

(L7) *New Balkis Eersteling V. Randt Gold Mining Co.* (1908) A.C. 165.

(L8) (1908) A.C. 165.

(L9) *Stocken's Case* (1868) 3 Ch. 415.

(L10) *Bolton* (1930) 2 Ch. 48.

(L11) *Creyke's Case* (1869) L.R. 5 Ch. App. 63.

(L12) *Aaion's Reef V. Twiss* (1896) A.C. 273.

(L13) *Trevor V. Whitworth* (1887) 12 A.C. 409.

§. 190. a long period the Court will restore to the register the name of the person who surrendered the shares to the company, the said shares not having been re-issued or otherwise dealt with by the company in the meantime^(L14). But a transfer of fully paid shares to a nominee who is to hold them for the benefit of the company is not invalid. For in such a case the company pays nothing for the shares and its capital is not in any way reduced^(L15). A surrender of shares for the purpose of receiving from the company new shares of an equivalent amount is invalid as it operates as a reduction of share capital^(L16). But a surrender will be perfectly valid where it does not operate as a reduction of share capital and does not also amount to a purchase by a company of its own shares^(L17). It is otherwise however, if the surrender has the effect of reducing the share capital of the company even though the shares be fully paid, unless such a surrender can be supported only under circumstances which would justify a forfeiture^(L18).

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the account of the official liquidator in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

Power to order
payment into
bank.

189. All moneys, bills hundis, notes and other securities paid and delivered into the Bank where the liquidator of the company may have his account, in the event of a company being wound-up by the Court, shall be subject in all respects to the orders of the Court.

Regulation of
account with
Court.

190. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be con-

(L14) Anglo-French Exploration Co. (1902) 2 Ch. 845.

(L15) Kirby V. Wilkins (1929) 2 Ch. 444.

(L16) Teasdale's Case (1873) 9 Ch. 54.

(L17) Rowell V. John Rowell & Sons, Ltd. (1912) 2 Ch. 609.

(L18) Bellerby V. Rowland & Marwood's Steamship Co. (1902) 2 Ch. 14.

Order on contributory conclusive evidence.

clusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due. **S. 191.**

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

Order on contributory conclusive:—A balance order made on a contributory is, subject to any right of appeal conclusive evidence that any money thereby appearing to be due or ordered to be paid is in fact due. The balance order is not a judgment, though it may be enforced in the same manner as a judgment^(m). But the remedy of a person whose objection to his being put on the list of contributories of bringing a suit for a declaration that he is not liable to be put on the said list is not taken away by this section⁽ⁿ⁾.

191. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

Power to exclude creditors not proving in time.

Exclusion of creditors not proving in time:—It is the duty of the liquidator to apply the assets of the company in satisfaction *pari passu* of the liabilities of the company as they exist at the commencement of the winding-up^(o). The Court for this purpose usually fixes a time within which persons claiming to be creditors of the company are required to prove their debts. Where a creditor fails to bring in his claim by the date announced by the official liquidator for claims to be made, he is not precluded from coming in at a later stage. The only penalty for failure to come in within the time stated in the notice is that prescribed by the latter part of the section, namely that the claimant would be excluded from the benefit of any distribution made before his

(m) *Modern Chemical Works, Ltd. v. Makudam Dhar* (1936) 17 Lah. 341.

(n) *Santi Lal v. Indian Exchange Bank* (1916) 38 All. 539.

(o) *Smith, Knight & Co.* (1868) 5 Eq. 223.

S. 192. debt was proved^(p). As long as there are assets of the company undistributed, a person claiming to be a creditor may come in at any time and prove his debt, but he is not entitled to disturb any dividend already declared^(q). Even a time-barred debt is proveable in the winding-up of the company, where the right to sue on it subsisted at the date of the winding-up order^(r).

192. The Court shall adjust the right of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

Adjustment of rights of contributories.

Adjustment of rights of contributories:—After the satisfaction of all the debts of the company and the payment of the costs, charges and expenses of the winding-up, the Court should distribute the surplus assets if any, among the members, according to their rights and interests in the company. As to what the rights of the contributories are, must be ascertained from the memorandum and the articles. The expression "surplus assets" means what is left after the payment of debts and the repayment of the whole of the preference and ordinary capital to the shareholders^(s). The manner in which the rights of the contributories among themselves are adjusted is either,

- (1) by making larger returns to those who have paid more on their shares, either by payment of calls in advance or in any other manner, or
- (2) by making calls on those members who have paid less on their shares. The holder of a fully paid share is a contributory, and in the distribution of the surplus assets after the winding-up he is entitled to receive the difference between the amount paid and the amount unpaid on the other shares^(t). The holders of partly paid shares are also entitled to rank for the amount

(p) *Isaac Jesudasan Pillai V. D. B. Ramaswamy Chetty* (1904) 27 Mad. 497.

(q) *General Rolling Stock Co.* (1872) 7 Ch. App. 646.

(r) *Fatma Bibi V. Nagoor Khan* (1932) 55 Mad. 630.

(s) *Dunstable Portland Cement Co., Ltd.* (1932) 48 T.L.R. 223.

(t) *Hodges Distillery Co.* (1870) 6 Ch. App. 51; *Anglesea Colliery Co.* (1866) 1 Ch. App. 555.

paid and are subject to a call for equalisation^(u). **S. 192.** Where a payment has been made in advance of calls the surplus must be distributed in payment of the shareholders who have made payment in advance of calls with interest, and the remainder must then be distributed between the other shareholders^(v).

In adjusting the rights of the contributories amongst themselves, the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded. And after discharging all debts and liabilities and repaying to the ordinary shareholders the capital paid on their shares, the assets must be divided among all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held by them^(w).

In the case of preference shares the preference ordinarily determines on a voluntary winding-up, and thenceforward preference shares retain no preference or priority over the ordinary shares. The surplus assets must then be distributed amongst all the shareholders *pro rata* in proportion to the amount paid up on their shares^(x). Where there are preference shares in a company, the memorandum and the articles should not be construed as either expressly or impliedly depriving the shareholders of their right as contributories to share in the distribution of surplus assets *pari passu* with the ordinary shareholders^(y). Where there are no arrears due to the preference shareholders at the date of the winding-up, as in cases where no preference dividend has been declared, the preference shareholders are not entitled to anything for arrears of dividends out of the surplus assets^(z). But where the preference shareholders are entitled to payment of all arrears of dividend and there is a fund available for payment, they are entitled to receive the full amount of the dividends in arrear in priority to any payment

(u) Home & Foreign Investment & Agency, Ltd. (1912) 1 Ch. 72.

(v) Wakefield Rolling Stock Co. (1892) 3 Ch. 165.

(w) Birch v. Cooper (1889) 14 A.C. 525.

(x) Madame Tussaud & Sons, Ltd. (1927) 1 Ch. 657.

(y) William Metcalfe & Sons, Ltd. (1933) 1 Ch. 142.

(z) Roberts & Cooper, Ltd. (1929) 2 Ch. 303.

S. 193. to the ordinary shareholders^(a). Where owing to loss incurred by a company no preferential dividend has been declared for a number of years and when the company goes into liquidation a sum of money is left over after payment of all its debts, the preference shareholders are not entitled to have this sum applied in paying them dividends for the number of years in which they had received none, but it must be applied as capital rateably among all the shareholders^(b). If there are reserve funds representing undrawn profits uncapitalised, they must be treated as income to which, subject to the preferential dividend to which the preference shareholders are entitled, must be distributed among ordinary shareholders exclusively^(c).

When a call is made on the 'B' contributories, and the proceeds of the call is in excess of their liability, the surplus must be refunded to them. The calls must first be enforced against all the 'B' contributories who had not paid it, so as to produce equality of contribution and distribution^(d).

193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

Power to order costs.

Costs of winding-up:—This section applies where the assets of a company which is being wound-up by the Court are insufficient to satisfy the liabilities. Section 218 applies in the case of a voluntary liquidation and provides that all costs, charges and expenses properly incurred in the winding-up including the remuneration of the liquidator shall, subject to the rights of secured creditors if any, be paid out of the assets of the company in priority to all other claims^(e). It has been held that the cost incurred by a voluntary liquidator in opposing a compulsory winding-up order, may, in the dis-

(a) *Walter Symons, Ltd.* (1934) 1 Ch. 308.

(b) *Crichton's Oil Co.* (1902) 2 Ch. 86.

(c) *Bridgwater Navigation Co.* (1891) 2 Ch. 317.

(d) *City of London Insurance Co., Ltd.* (1932) 1 Ch. 226.

(e) *Benj-Felkai Mining Co.* (1934) 1 Ch. 406.

cretion of the Court be ordered to be paid in priority to **S. 194.** other debts^(f).

The rules of the Indian High Courts do not make any provision as to the priority of payments when the assets of the company are insufficient to satisfy all debts and liabilities. According to English practice, which it is submitted may with advantage be applied to Indian conditions, the order of priority is as under:

- (1) Costs of the petition for winding-up.
- (2) The remuneration of the special manager, if any is appointed.
- (3) The cost of any person who makes or concurs under section 177A in making the company's statement of affairs.
- (4) Disbursements made by the liquidator.
- (5) Costs of any person employed by the liquidator, such as a solicitor^(g).
- (6) Liquidator's remuneration, and
- (7) The out-of-pocket expenses if any, incurred by the committee of inspection^(h).

194. (1) When the affairs of a company have been completely wound-up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Dissolution of
company.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

Dissolution of the company:—When the affairs of the company have been completely wound-up, the Court makes

(f) William Adler & Co., Ltd. (1935) 1 Ch. 138.

(g) Meter Cabs, Ltd. (1911) 2 Ch. 559.

(h) London Metallurgical Co. (1897) 2 Ch. 262.

S. 195. an order that the company be dissolved from the date of the order so as to bring it to an end. The order of the Court operates as a dissolution of the company from the date of the order⁽ⁱ⁾. From the date of this order the company ceases to function, but the Court has power under section 243 to declare the dissolution void if fraud is established.

In the absence of fraud, a dissolution,

- (1) operates as an absolute bar to an action against the company and its directors for anything done before the winding-up, such as the alleged payment of dividends out of capital while the company was a going concern^(j);
- (2) precludes a person from proving a debt as being a debt due from the company^(k);
- (3) puts an end to the powers of the liquidator, e.g., from indorsing a promissory note in favour of any person^(l);
- (4) renders a judgment against the company invalid^(m);
- (5) puts an end to a lease made in favour of the company and the lease reverts back to the lessor⁽ⁿ⁾.

But if the liquidator allows the company to be dissolved without making any provision for the contingent liabilities of the company, he acts wrongfully and negligently and is liable in damages^(o). But an order of the Court declaring the dissolution of a company void does not affect the validity of the proceedings taken during the interval between the dissolution and its avoidance^(p).

Extraordinary Powers of Court.

195. (1) The Court may, after it has made a winding-up order, summon before it any officer of the

(i) *Shragers, Ltd.* (1920) 47 Cal. 620.

(j) *Coxon V. Gorst* (1891) 2 Ch. 73.

(k) *Westbarne Grove Drapery Co., Ltd.* (1878) 39 L.T. 30.

(l) *Ramachandra Rao V. Kandaswami Chetty* (1895) 18 Mad. 498.

(m) *Salton V. New Beaton Cycle Co.* (1900) 1 Ch. 43.

(n) *Hastings Corporation V. Letton* (1908) 1 K.B. 378; *Hanham V. Howard* (1933) 1 Ch. 29.

(o) *James Smith & Sons Ltd. V. Goodman* (1936) 1 Ch. 216.

(p) *Morris V. Harris* (1927) A.C. 252.

Power to summon persons suspected of having property of company.

company or person known or suspected **S. 195.**

to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination.

Power to summon persons suspected of having property of company:—The object of the examination under this section is to obtain information so as to enable the Court to determine what steps should be taken with reference to some matter in the winding-up of the company^(q). It is not necessary, in order to found an application under this section, that any *prima facie* case should be made out. All that the judge has to see is that there is a reasonable suspicion that the evidence acquired through the medium of the examination of the witnesses may lead to such a case^(r).

(q) *Grey's Brewery* (1884) 25 Ch. D. 400.

(r) *Gold Company* (1879) 12 Ch. D. 77.

S. 195. An application under this section is generally made by the liquidator, but it is competent for any other person such as a creditor or contributory to make the application. The Court also may without any application and of its own motion, order an examination under this section^(s). The conduct of the examination is usually entrusted to the liquidator, but if the liquidator has refused to apply, or where the application has been presented for the examination of the liquidator himself, the conduct of the proceedings may be entrusted to a creditor or contributory^(t). The jurisdiction of the Court to make an order for examination under this section is merely discretionary and is not claimable as of right by any party^(u). The Court will not allow them to be used for the purposes of vexation or oppression^(v).

Persons against whom orders may be made:

- (1) A person who is indebted to a contributory is liable to be summoned and to give information as to the means of the contributory^(w).
- (2) The manager of a bank where a contributory has had an account is liable to attend and be examined and to produce any books and documents relative to such account^(x).
- (3) The relatives of an indebted contributory such as his sister and nephew are liable to be summoned, although there are no facts proved except the relationship, to connect them with the contributory or the company^(y).
- (4) A broker may be summoned for examination touching the estate and effects of the company^(z).
- (5) The mother-in-law of the contributory may be examined as to the address of the contributory

(s) Land Securities Co. Ltd. (1894) 42 W.N. 624.

(t) Sir John Moore Gold Mining Co. (1877) 37, L.T. 242.

(u) Hargreaves (Joseph) Ltd. (1900) 1 Ch. 347.

(v) Imperial Continental Water Corporation (1886) 33 Ch. D. 314.

(w) Land Credit Co. of Ireland (1872) 14 Eq. 8.

(x) Contract Corporation (1872) 14 Eq. 6.

(y) Swan's Case (1870) 10 Eq. 675.

(z) Clement's Case (1868) 13 Eq. 179 (note).

where she had refused to furnish it to the liquidator^(a). **S. 195.**

- (6) A shareholder of another company may be summoned for the purpose of proving that he is a nominee of the contributory^(b).

But a mere creditor of a company in liquidation who is not shown to be capable of giving evidence is not a person to be examined under this section^(c). Further, the power must not be used for the purpose of giving to the plaintiff means of discovery, in an action brought to enforce his own individual rights, and which cannot manifestly be for the benefit of the company^(d).

Examination under this section a private proceeding:—

An examination under this section is a strictly private proceeding, and no petitioning creditor can as of right claim to be present. For instance, a person not charged with fraud should not be ordered to be examined in open court^(e). It is only on very rare occasions if at all, that the Court will allow the petitioning creditor to be present at the examination held by the liquidator^(f). The person examined is bound to give all information which he is capable of giving, even though the questions may be as to matters which are mere hearsay. The object of the section is to enable the official liquidator to get full information as to all the company's affairs and hearsay may be valuable in putting him on the right inquiries^(g). The office of the examiner of the Court is not a public Court, and if the presence of the public is objected to the examiner has no discretion to admit them^(h). Any information derived in the course of an examination can be used by a public servant charged with the investigation of a criminal offence, and such officer should be allowed to inform himself as to anything which might have come to light on any such examination⁽ⁱ⁾.

(a) *Fricker's Case* (1868) 13 Eq. 179.

(b) *Contract Corporation* (1871) 6 Ch. App. 145.

(c) *Accidental & Marine Insurance Corporation* (1867) 5 Eq. 22.

(d) *Imperial Continental Water Corporation* (1886) 33 Ch. D. 314.

(e) *Property Insurance Co. Ltd.* (1914) 1 Ch. 775.

(f) *Moola Dawood Cotton Mfg. Co. Ltd.* (1923) 1 Rang. 384.

(g) *Ottoman Co.* (1867) 15 W.R. 1069.

(h) *Western of Canada Oil, Lands & Works Co.* (1877) 6 Ch. D. 109.

(i) *Regent Park Syndicate Ltd.* (1929) 57 Cal. 424.

S. 196.

196. (1) When an order has been made for winding-up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

Power to order public examination of promoters, directors etc.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

Order for public examination when made:—The power of the Court to order the public examination of a person coming within the terms of sub-section (1) of this section arises only when the official liquidator has under section 177B (2) made a further report from which it appears that in his opinion a fraud has been committed by a person in the promotion or formation of the company, or by a director or other officer of the company in relation to the company since its formation. The power of the Court to direct the public examination of the persons mentioned does not apply to any one against whom a *prima facie* case of fraud has not been disclosed by the further report of the official liquidator^(j). The report of the liquidator must state facts showing a basis for his opinion and warranting the judge in calling upon the person implicated for an explanation^(k). In such cases however

(j) *Ex Parte George S. Barnes* (1896) A.C. 146.

(k) *Civil, Naval & Military Outfitters Ltd.* (1899) 1 Ch. 215.

it is the duty of the Court to consider the application with respect to the information contained in it. But there is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal trial under the Penal Code⁽¹⁾. The jurisdiction under this section is purely discretionary and since the examination is of a highly penal nature orders under this section are rarely made, as a private examination under section 195 is in ordinary cases sufficient to secure the fullest information. **S. 197.**

But the section will not apply where the charges against the company are of having committed frauds on the public and not in any way connected with the promotion or formation^(m). But if an order for examination is once made it will not be discharged on the ground that fraud is not sufficiently shown by the liquidators' report on which the order is made. In such cases the aggrieved party can only prefer an appeal on the ground that the order was made without jurisdiction⁽ⁿ⁾. A voluntary liquidator can also apply to the Court under this section for an examination of the persons connected with the management of the company^(o).

Where the person examined under this section is exculpated by the public examination he is ordinarily entitled to be paid his cost out of the assets of the company^(p).

The intention of the Legislature in using the words "civil proceedings" in section 196 (7) was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned; and in criminal proceedings also subject to the provisions of section 132 of the Indian Evidence Act, 1872. The section is not intended in any way to over-ride the provisions of the Evidence Act^(q).

197. The Court, at any time either before or after making a winding-up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of

Power to arrest absconding contributory.

(1) *Indian States Bank Ltd.* (1933) 56. All. 496.

(m) *Medical Battery Co.* (1894) 1 Ch. 444.

(n) *New Travellers Chambers Ltd.* (1895) 1 Ch. 395.

(o) *Sardar Nowroji Padamji V. Laxman Moreshwar* (1920) 44 Bom. 459.

(p) *Amusements Construction Co. Ltd.* (1927) W.N. 7.

(q) *Ramchand Gurvala V. King-Emp* (1926) A.I.R. Lah. 385.

s. 200. his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and moveable property to be seized, and him and them to be safely kept until such time as the Court may order.

198. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

Saving of other sums.

Saving of other proceedings:—This section provides that the powers conferred on the Court by this Act shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company for the recovery of any call or other sums. Thus, a liquidator is not bound to proceed by way of balance order under sections 186 and 187, but may if he pleases bring a regular suit to recover the amount of the call money^(r). Likewise, the mere fact that misfeasance proceedings have been taken against any person under section 235 for the frauds he has committed does not prevent the filing of a suit for the recovery of the money misapplied by him.^(s)

Enforcement of and Appeal from Order.

199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

Power to enforce orders.

200. Any order made by a Court for or in the course of the winding-up of a company shall be enforced in any place in British India other than that in which such Court is situate by the Court that would have had jurisdiction in respect of such company if

Order made in any Court to be enforced by other Courts.

(r) *Westmoreland Green & Blue Slate Co. V. Fielden* (1891) 3 Ch. 15.

(s) *Dehra-Dun Mussorie Electric Tramway Co. V. Hansraj* (1936) 58 All. 342.

the registered office of the company had been situate **S. 203.**
at such other place, and in the same manner in all res-
pects as if such order had been made by the Court that
is hereby required to enforce the same.

201. Where any order made by one Court is to
be enforced by another Court, a certified copy of the
order so made shall be produced to the
proper officer of the Court required to
enforce the same, and the production of
such certified copy shall be sufficient
evidence of such order having been
made; and thereupon the last-mentioned Court shall
take the requisite steps in the matter for enforcing the
order, in the same manner as if it were the order of the
Court enforcing the same.

Mode of dealing
with orders to
be enforced by
other Courts.

202. Re-hearings of and appeals from, any order
or decision made or given in the matter of the winding-
up of a company by the Court may be
had in the same manner and subject to
the same conditions in and subject to
which appeals may be had from any order or decision
of the same Court in cases within its ordinary jurisdic-
tion.

Appeals from
orders.

Voluntary winding up.

203. A company may be wound up voluntari-
ly—

Circumstances
in which com-
pany may be
wound up vo-
luntarily.

- (1) when the period (if any) fixed for the du-
ration of the company by the articles
expires, or the event (if any) occurs,
on the occurrence of which the articles
provide that the company is to be dis-
solved and the company in general meet-
ing has passed a resolution requiring the
company to be wound up voluntarily;
- (2) if the company resolves by special resolu-
tion that the company be wound up vol-
untarily;

S. 203. (3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up. and the expression 'resolution for voluntarily winding-up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section.

Modes of voluntary winding-up:—This section states the circumstances in which a company may be wound up voluntarily. The object of the Act is that a company and its creditors should be left if possible, to settle their own affairs without coming to Court at all, but only to provide them with the means of access to the Court whenever any question arises, in the course of the voluntary winding-up^(t). The reason is, that these companies are governed by a majority of their members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that tribunal and the Court should not interfere, unless there is a very strong ground for interference^(u).

The Act contemplates the voluntary winding-up by three different kinds of resolutions:

Clause (1):—Ordinary resolution:—A company can be wound up by an ordinary resolution when, (1) the period if any, fixed in the articles expires, or (2) the event if any occurs, on the occurrence of which it is provided by the articles that the company is to be dissolved.

Clause (2):—Special resolution:—A company may be wound up voluntarily by special resolution in cases where the members desire to wind up the company for any reason other than its inability to pay its debts. It is competent to the members to resolve by special resolution upon the voluntary winding up even if the company is in a flourishing condition. Thus, where a lease contained a proviso for re-entry if the lessee being a company should enter into liquidation, volun-

(t) *Rance's Case* (1870) 6 Ch. 104.

(u) *Laughton Skating Rink Co.* (1877) 5 Ch. D. 669.

tary or compulsory, and the lessee a solvent company entered into liquidation only for the purpose of reconstruction with additional capital, it was held that it was a liquidation within the meaning of the proviso^(v). **S. 204.**

Clause 3: Extraordinary Resolution: A company can be wound up by an extraordinary resolution only in cases where by reason of its liabilities it cannot continue its business, and resolves that it is available to wind up the same. It is necessary that the notice of the meeting should express that it is intended to propose a resolution that the company is unable by reason of its liabilities to continue its business^(w).

Notice of the meeting to wind up voluntary must be issued by the authority of a resolution of the board of directors. If the notice summoning the meeting is issued by the secretary without the authority of a resolution of the directors duly assembled at a board, it is ineffectual^(x).

204. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution for voluntarily winding-up.

Commencement of voluntary winding-up.

Commencement of voluntary winding up:—This section enacts that the voluntary winding-up of a company shall be deemed to commence from the date when the resolution ordinary, extraordinary or special as the case may be, is passed. Under section 168 a winding-up by the Court shall be deemed to commence from the time of the presentation of the petition on which the order is made. Where a voluntary winding-up is superseded by a compulsory winding-up order, the date of the commencement of the winding-up is the date of the presentation of the petition^(y). Where a voluntary winding-up is continued under the supervision order, the date of the commencement of the winding-up is the date of the passing of the special or extraordinary resolution as the case may be.

(v) *Horsey Estate Ltd. v. Steiger & The Petrifite Co. Ltd.* (1898) 2 Q.B. 259.

(w) *Silkstone Fall Colliery Co.* (1875) 1. Ch. D. 35.

(x) *Haycroft Gold Reduction & Mining Co.* (1900) 2 Ch. 230.

(y) *Taurine Co.* (1884) 25 Ch. D. 110.

S. 206. The Court has no power to alter the date of the commencement. Where therefore a petition for a compulsory order was presented and a provincial liquidator appointed and a resolution for voluntary winding-up was passed between that date and the hearing of the petition, it was held that the Court could not on making a supervision order direct that the commencement of the winding-up should date back to the petition⁽²⁾.

205. When a company is wound up voluntarily, the company shall, from the commencement of the winding-up, cease to carry on its business, except so far as may be required for the beneficial winding-up thereof:

Effect of voluntary winding-up on status of company.

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

Effect of voluntary winding up:—This section provides that the company shall from the commencement of the winding-up cease to carry on business except so far as may be required for the beneficial winding-up thereof. But the company's corporate state and corporate powers shall continue notwithstanding anything contained in the articles until the company is dissolved. The business of the company is to be carried on only for the purpose of realisation and not with the view of making a profit as a going concern^(a).

206. (1) Notice of any special resolution or extraordinary resolution for winding-up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the local official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

Notice of resolution to wind-up voluntarily.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day dur-

(2) *West Cumberland Insurance Co.* (1889) 40 Ch. 361.

(a) *Ex Parte Emmanuel* (1881) 17 Ch. D. 35.

which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty. **S. 207.**

Notice of resolution to wind up voluntarily:—Where a company is sought to be wound-up by a special or extraordinary resolution, this section provides that notice shall be given within ten days of the passing of the same, by advertisement in the local official Gazette as well as in some newspaper circulating in the district where the registered office of the company is situate.

The mere fact that a resolution has been passed for winding-up the company voluntarily does not cause the powers of the directors to cease. A general meeting of the company in voluntary liquidation has power to elect directors and sanction the exercise by them of powers of enforcing payment of calls by sale or forfeiture of shares^(b). And in cases where a contract has been entered into with a company after it has commenced proceedings for a voluntary winding-up, it lies on the company to show that the contract was not required for the beneficial winding-up of the company and in the absence of such evidence the plaintiff is entitled to succeed^(c).

207. (1) Where it is proposed to wind-up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding-up of the company is to be proposed are sent out, to make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding-up.

(2) Such declaration shall be supported by a report of the company's auditors on the company's

(b) *Ladd's Case* (1893) 3 Ch. 459.

(c) *The Hire Purchase Furnishing Co. Ltd. v. Richens* (1888) 20 Q.B.D. 387.

S. 208. affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in sub-section (1) of this section.

(3) A winding-up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as a 'members' voluntary winding-up, and a winding-up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditors' voluntary winding-up'.

Declaration of solvency:—The old sections 207 to 219 have been entirely repealed and have been replaced by sections 207 to 218 by the Amendment Act of 1936.

S. 207 provides that where it is proposed to wind up a company voluntary, the directors shall make a declaration verified by affidavit, to the effect that they have made a full inquiry into the affairs of the company and that having done so they are of the opinion that the company will be able to pay its debts in full within a period not exceeding three years from the commencement of the winding-up. Such a declaration supported by a report of the company's auditors on the company's affairs shall be filed for registration with the registrar before the date on which the notices of the meeting at which the resolution for the winding-up of the company are proposed to be sent out. A winding-up in such a case, viz., where the declaration has been made is called a "members' voluntary winding up", and in cases where no such declaration has been made it is known as a "creditors' winding-up".

Sections 208 to 208E are applicable only to a members' voluntary winding-up; sections 209 to 209H are applicable only to a creditors' voluntary winding up. Sections 210 to 218 and 220 apply to both kinds of winding-up.

Members' Voluntary Winding-up.

208. The provisions contained in sections 208A to 208E, both inclusive, shall apply in relation to a members' voluntary winding-up.

Provisions applicable to a members' voluntary winding-up.

208A. (1) The company in general meeting S. 208B.

Power of company to appoint and fix remuneration of liquidators.

shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.

208B. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

Power to fill vacancy in office of liquidator.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

Appointment of liquidators in members' voluntary winding up:—In a members' voluntary winding up the company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and the company shall fix the remuneration to be paid to him or them. A resolution appointing a liquidator is operative only when there is an effective resolution to wind up the company^(d). Generally a notice that a certain person will be proposed to be appointed as the liquidator is given. After the resolution has been passed, liquidators may be appointed at the same meeting without any special notice of the intention to propose their appointment^(e). A resolution for the appointment of a named person may be dropped, and a resolution for the appointment of another

(d) *Indian Zoedone Co.* (1884) 26 Ch. D. 70.

(e) *Welsh Flannel & Tweed Co.* (1875) 20 Eq. 360.

208C. person may be proposed and carried without further notice^(f). The resolution appointing them must not restrict them in the exercise of their duties, e.g., that they should be subject to the supervision of the directors^(g).

Appointment and removal by Court:—Having regard to the authority with which the liquidator of a company is invested, he must be a person who will act independently of those against whom there may be pending claims, and will discharge his duties without favour to either side^(h). Where he fails to perform his duties he will be removed by the Court⁽ⁱ⁾. The jurisdiction of the Court to remove a liquidator is not confined to cases where there is personal unfitness in the liquidator. The cause shown for his removal is to be measured by reference to the real, substantial and honest interest of the liquidation, and to the purpose for which the liquidator is appointed^(j). The application for the removal of an existing liquidator and for the appointment of another liquidator in his stead may be made by a creditor or contributory^(k). In a voluntary winding up, the Court may appoint a new liquidator on the retirement of a liquidator^(l). The Court has power to appoint an additional liquidator and the appointment may be made on the application of the existing liquidator^(m).

Remuneration:—The company in general meeting may fix the remuneration to be paid to the liquidator on it. Where the remuneration is not fixed it is open to the Court to fix it having regard to the circumstances of the particular case⁽ⁿ⁾.

208C. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the trans-

Power of liquidator to accept shares, etc. as consideration for sale of property of company.

(f) *Bethell V. French Tubless Tyre Co.* (1900) 1 Ch. 403.

(g) *Shamdasani V. Tata Industrial Bank Ltd.* (1928) 55. I.A. 274.

(h) *Chartered Goldfields Ltd.* (1909) 26. T.L.R. 132.

(i) *Kesavaloo Naidu V. Murugappa Mudali* (1907) 30 Mad. 22.

(j) *Kaikhurru V. Tata Industrial Bank Ltd.* (1924) 48 Bom. 471.

(k) *New De Kaap Ltd.* (1908) 1 Ch. 589.

(l) *Sheppy Portland Cement Co. Ltd.* (1892) 68 T.L.R. 83.

(m) *Sunlight Incandescent Gas Lamp Co.* (1900) 2 Ch. 728.

(n) *Amalgamated Syndicate, Ltd.* (1901) 2 Ch. 181; *Carlton, Ltd.* (1923) 128 30 Bom. L.R. 197.

feree company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. **S. 208C.**

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding-up or for appointing liquidators, but if an order is made within a year for winding-up the company by or subject to the supervision of the Court, the special

208C. resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

Sale of undertaking of company in voluntary liquidation:—A sale of the company's undertaking with a view to reconstruction is carried out under the provisions of this section. Reconstruction or amalgamation is resorted to by companies when they want to make some alterations in the objects of the company, or to deal with the capital of the company in a manner not authorised by sections 50 to 55. "Reconstruction" occurs where an undertaking carried on by a company is in substance preserved and transferred not to an outsider, but to another company consisting substantially of the same shareholders, with a view to its being continued by the transferee company. It is none the less a reconstruction because all the assets do not pass to the new or resuscitated company, and all the shareholders of the transferor company are not shareholders in the transferee company and the liabilities of the transferor company are not taken over by the transferee company^(o).

An "Amalgamation" is the blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blended undertaking being substantially the shareholders in the company which holds the blended undertakings. There might be an amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company^(p).

(o) *Wild V. The South African Etc. Co.* (1904) 2 Ch. 268.

(p) *Re London and Lancashire Fire Insurance Co. v. Royal Exchange Assurance* (1935) 1 Ch. 567.

In order that the provisions of this section may come into effect, a special resolution must be passed that it is advisable to reconstruct or amalgamate as the case may be, and authorising the company to wind itself up voluntarily. The resolution must appoint liquidators conferring upon them either a general authority or an authority in respect of any particular arrangement, to sell or to transfer the undertaking of the company in consideration of shares, policies or other like interests in the transferee company for distribution among the members of the transferor company^(q). Any member of the transferor company who dissents from and has not voted in favour of the resolution may, within seven days, from the passing of the resolution by notice in writing signed by him and addressed to the liquidator, require him either to abstain from giving effect to the resolution or to purchase his interest at a price to be determined by agreement or arbitration^(r). An arrangement which leaves no assets or uncalled capital out of which dissentients can be paid the value of their shares cannot be carried out against their wishes^(s).

The reconstruction of an existing company by winding-up and sale of its entire undertaking and assets for shares in a new foreign company, though outside the scope of a reconstruction under this section, may be effected as an arrangement under sections 153 and 153A of this Act^(t). Even an unregistered company which has no power under its deed of settlement to sell and transfer its business to another company may carry into effect an agreement for that purpose by registering itself under this Act, and then passing a resolution for voluntary winding-up and directing the liquidator to carry out the agreement^(u).

The mere fact that the special resolution has been passed either before or concurrently with the resolution for voluntary winding up does not invalidate the resolution. But if an order is made within a year for winding up the company by or under the supervision of the Court, the special resolu-

(q) *Utheridge v. Central Uruguay Northern Extension Rly.* (1913) 1 Ch. 425

(r) *Demarara Rubber Co. Ltd.* (1913) 1 Ch. 331.

(s) *Hestor & Co. Ltd.* (1875) 44 L.J. Ch. 757.

(t) *Anglo-Continental Supply Co.* (1922) 2 Ch. 723.

(u) *Southall v. British Mutual Life Assurance Society* (1871) 6 Ch. App. 614.

S. 208C. tion shall not be valid unless sanctioned by the Court^(v). In giving its sanction, what the Court has to see is first of all that the provisions of the statute have been complied with, and secondly that the majority have been acting *bona fide*. The Court has also to see that the minority is not being over-ridden by a majority having interest of its own clashing with that of the minority whom they seek to coerce. Further, the Court has to look at the scheme and see whether it is one as to which persons acting honestly and viewing it in the interest of those whom they represent would take a view which can be reasonably taken by business men^(w). The Court will also have regard to the wishes of the majority of the shareholders and creditors expressed on full information afforded to them, as against the opposition of the dissentient minority, and if the dissentient shareholder neither accepts shares in the new company, nor the valuation put upon his interest by the liquidator, the price of his interest must be settled by arbitration^(x).

The arrangement once made is binding on all the creditors of the company. The remedy of any creditor who cannot get his debt paid is only to petition the Court for a compulsory winding-up or a winding-up subject to the supervision of the Court before the expiration of a year from the date of the special resolution^(y).

This section may be compared with section 153A. The present section applies only where a company is proposed to be or is in the course of being wound up altogether voluntarily, while section 153A applies even where the company is a going concern. Again under section 153A an arrangement once sanctioned by the Court is binding on all the persons, subject to any provision made by the Court for any dissentients, while under this section no sanction of the Court is necessary, but any dissentient who has not voted in favour of the resolution may himself, within seven days of the passing of the resolution require the liquidator either to abstain from

(v) *Callao Bis Co.* (1889) 42. Ch. D. 169.

(w) *Dorman Lang Co.* (1934) 1 Ch. 635; *Tata Iron & Steel Co. Ltd.* (1927) 30 Bom. L.R. 197.

(x) *Imperial Mercantile Credit Association* (1871) L.R. 12 Eq. 504.

(y) *City & County Investment Co.* (1879) 13 Ch. D. 475.

carrying the resolution into effect or to purchase his interest **S. 208D.** at a price to be determined by agreement, or failing that by arbitration. Under section 153A the arrangement must have been agreed to by a majority in number representing three-fourth in value of the creditors, whereas under this section the arrangement is entered into by the liquidator in pursuance of a special resolution of the company.

208D. (1) In the event of the winding-up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding-up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

Duty of liquidator to call general meeting at end of each year.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

Duty to call general meeting at the end of the year:—

This section must be read along with section 244. The combined effect of both these sections is that in the event of the winding-up continuing for more than one year, the liquidator must summon a general meeting of the company at the end of each succeeding year and lay before the meeting an account of his acts and dealings and the conduct of the winding-up during the preceding year. Once in each year and at intervals of not more than twelve months until the winding-up is concluded, he shall file with the registrar a statement in the prescribed form containing the prescribed particulars with respect to the proceedings in liquidation. A copy of this statement must also be laid before the members of the company in general meeting.

S. 208E. **208E.** (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

Final meeting
and dissolution.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the

date at which the dissolution of the company is to take effect for such time as the Court thinks fit. S. 208E.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twentyone days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Final meeting and dissolution of company:—This section provides that when the affairs of the Company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of. He shall then call a general meeting of the company for the purpose of laying before it the account and giving any explanation thereof. The meeting shall be called by advertisement in the local official Gazette and also in some local newspapers circulating in the district where the registered office of the Company is situate specifying the time, place and object thereof, and published at least one month before the meeting. Within one week after the meeting the liquidator shall send to the registrar a copy of the account and make a return to him of the holdings of the meeting and of its date, provided that if there is no quorum the liquidator shall make a return stating that a meeting was duly summoned but that no quorum was present.

On the registration by the registrar of the account and the return, the company shall be deemed to be dissolved from the expiration of three months from the date of the registration. The refusal or failure of the registrar however, to register does not operate as registration, whether the reasons for the refusal were good or bad^(z). But the Court may on the application of the liquidator or of any other person interested make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit. A certified copy of the order must be filed for

(z) Shaw Bros V. Army Canteen Board Ltd. (1931) 13 Lah. 190.

S. 209A. registration with the registrar within twentyone days after the making of the order by the person on whose application the order was made. If such person makes default he shall be liable to a fine not exceeding Rs. 50/- for every day that the default continues.

The winding up of a company under the supervision of the Court should also as a general rule, be terminated in the same way as a purely voluntary winding up. But the Court has power to interfere and to exercise to any extent the powers which it might have exercised if an order had been made for winding up by the Court^(a).

('reditors' voluntary winding up.

209. The provisions contained in sections 209A
 Provisions ap- to 209H, both inclusive, shall apply in
 plicable to a relation to a creditors' voluntary wind-
 creditors' vo- ing up.
 luntary wind-
 ing-up.

209A. (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notice of the said meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting

(a) The Carwar Co. Ltd. (1882) 6 Bom. 640.

of creditors to be held as aforesaid; **S. 209A.**
and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4);

the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty.

Meetings of creditors:—This section which deals with the creditors' voluntary winding up provides that the company shall cause a meeting of the creditors to be summoned for the day on which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting to be sent by post to the creditors. The notice of the meeting of the creditors must be advertised by being published in the local official Gazette and in one local newspaper circulating in the district where the registered office of the company is situate. The directors of the company shall cause

S. 209C. a full statement of the company's affairs to be prepared along with the list of the company's creditors and the estimated amount of their claims, to be laid before the meeting of creditors, and appoint one of the directors to preside at the said meeting. Any resolution which is passed at the meeting of creditors shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company, though the latter resolution is passed at an adjourned meeting.

209B. The creditors and the company at their respective meetings mentioned in section 209A may
 Appointment of liquidator. nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator:

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

209C. The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint
 Appointment of committee of inspection. a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of

persons as they think fit to act as members of the committee not exceeding five in number: **S. 209D.**

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

Appointment of liquidator and committee of inspection:—

The creditors and members of the company at their respective meetings may nominate a person to be the liquidator for the purpose of winding up the affairs and distribute the assets of the company; but if the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator and if no person is nominated by the creditors, the person nominated by the company shall be the liquidator. Where different persons are nominated application may be made to the Court by any member, director or creditor of the company within seven days after the date of the nomination for directing the appointment as liquidator of the person nominated by the Company, either jointly with or instead of, the person appointed by the creditors. (Vide S. 209 B).

The creditors may also at their meetings appoint a committee of inspection consisting of not more than five persons. In such a case the company may either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently, appoint such number of persons not exceeding five, as they think fit, subject to the orders of the Court, if the creditors object to all or any of the persons appointed by the Company. (Vide S. 209C).

209D. (1) The committee of inspection, or if there is no such committee, the creditors, may fix the

209G. Fixing of liquidators' remuneration and ceasing of directors' powers.

remuneration to be paid to the liquidator or liquidators, and where the remuneration is not fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.

209E. Power to fill vacancy in office of liquidator.

If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of, the Court, the creditors may fill the vacancy.

209F. Application of section 208C to a creditors' voluntary winding-up.

The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

209G. Duty of liquidator to call meetings of company and of creditors at end of each year.

(1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

209H. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

Final
and
dissolu-
tion.

S. 209H.

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holdings of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall, in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the

S. 212. registration thereof the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Members' or creditors' voluntary winding up.

210. The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a creditors' winding up.

211. Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Distribution of property of company.

212. (1) The liquidator may—

(a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (e), (f) and (h) of section 179 to a liqui-

Powers and duties of liquidator in voluntary winding-up.

dator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers;

- (b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in a winding up by the Court;
- (c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;
- (d) exercise the power of the Court of making calls;
- (e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointments, or, in default of such determination, by any number not less than two.

Powers and duties of liquidator in voluntary winding-up:—This section lays down the several powers and duties of the liquidator of a company in voluntary liquidation. He may exercise the powers given to the official liquidator by

S. 212. clauses (d), (e), (f) and (h) of section 179 with the sanction of an extraordinary resolution of the company in the case of a member's voluntary winding-up, and with the sanction either of the Court or the committee of inspection in the case of a creditor's voluntary winding-up. The exercise of these powers shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to the exercise of any of these powers. In the case of a compulsory winding-up the official liquidator may exercise any of the powers given by section 179 clauses (d), (e), (f) and (h) without the necessity of any sanction. For example, the power of instituting suits need not be expressly conferred on him by the resolution which appoints him liquidator^(b).

Clause (C):—Power to settle list of contributories:—The liquidator may under clause (c) exercise the power given to the Court of settling the list of contributories^(c). The list so settled shall be *prima facie* evidence of the liability of the persons named therein as contributories. Where a person has been improperly placed on the said list, he may apply to the liquidator for redress, and failing that he has power to apply to the Court. But in an action for calls, it is no defence that the defendant had no notice that his name was placed on the list of contributories^(d).

Clause (d):—Power to make calls:—The liquidator may exercise the power of the Court of making calls. He may either proceed by way of a balance order or may enforce the same by a regular suit^(e). He may also enforce a call which was made by the directors before the winding-up of the company^(f). Where a suit for calls has been instituted before the winding-up, he may abandon the same, but in such a case the defendant is entitled to the costs which he has incurred to be recovered from the property or assets of the company^(g).

Clause (e):—Summoning meetings:—The liquidator may summon meetings of the company for the purpose of

(b) *Bishambernath V. The Agra Electric Stores* (1932) 54. All. 541.

(c) *National Bank of Wales* (1896) 2 Ch. 851.

(d) *Brighton Arcade Co. Ltd. V. Dowling* (1868) L.R. 3 C.P. 175

(e) *Saraswati Trading Corporation Ltd.* (1929) 51 All. 406.

(f) *Collins V. The City & County Bank Ltd.* (1877) 3. C.P.D. 282.

(g) *United Service Association* (1901) 1 Ch. 97.

obtaining sanction of the company by special or extraordinary S. 212. resolution, or for any other purpose he may think fit, e.g., for sanctioning the sale of the undertaking of the company in consideration of receiving shares, policies etc., in the transferee company, (Vide section 208C) or for sanctioning a general scheme of liquidation (Vide section 234).

Sub-section (2):—Duty to pay debts:—The liquidator must pay the debts of the company and adjust the rights of the contributories among themselves. He is not justified in paying off statute-barred debts^(h). Where he pays an alleged claim which is time-barred or whose validity is uncertain, he is guilty of misfeasance under section 235 of the Act and is bound to repay to the company the money which he has so improperly paid out⁽ⁱ⁾. But he is not liable apart from negligence, for wrongly admitting a claim by an alleged creditor^(j). It is his duty to find out from the books and papers of the company and the statement of affairs as to who are the creditors of the company, and if any creditor omits to put in his claim, the liquidator should communicate with him. Where a creditor has no notice of the liquidation but the liquidator is aware of his claim and does not pay or provide for the payment, he is guilty of negligence in the discharge of his statutory duties and is liable in damages to the creditors unpaid^(k). He is also liable if he does not take steps to have the value of contingent liabilities ascertained^(l).

A liquidator is not strictly speaking a trustee for the creditors or the contributories of a company in liquidation, his position being that of an agent of the company. Therefore, in the absence of fraud, malafides or personal misconduct, an action for damages will not lie against the liquidator at the instance either of a creditor or contributory for delay in paying the creditor's debt or in handing over to the contributory his proportion of the surplus assets of the company^(m).

(h) Fleetwood V. District Electric Light & Power Syndicate (1915) 1 Ch. 486.

(i) Windsor Steam Coal Co. Ltd. (1929) 1 Ch. 151.

(j) Home & Colonial Insurance Co. Ltd. (1930) 1 Ch. 102.

(k) Pulsford V. Devinish (1903) 2 Ch. 625.

(l) James Smith & Sons Ltd. V. Goodman (1936) 1 Ch. 244.

(m) Knowles V. Scott (1891) 1 Ch. 717.

- S. 215.** **213.** (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.
 Power of Court to appoint and remove liquidator in voluntary winding up. (2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.

- 214.** (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.
 Notice by liquidator of his appointment.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

- 215.** (1) Any arrangement entered into between a company about to be, or in the course of being, wound-up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.
 Arrangement when binding on creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

Arrangement when binding on creditors:—When a company in the course of a voluntary winding-up effects an arrangement under this section, or an arrangement or compromise under the provisions of sections 153, 153A or 234, such arrangement or compromise shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

This section applies only to an arrangement entered into during a voluntary winding-up or shortly before the passing

of a resolution for a voluntary winding-up. A composition by a company with its creditors therefore, intended to make the company solvent and therefore to prevent a voluntary winding-up is not an arrangement within this section⁽ⁿ⁾. **S. 216.**

Any creditor or contributory may, within three weeks from the completion of the arrangement appeal to the Court against it, and the Court may vary, amend or confirm the arrangement in such manner as it thinks fit.

This section is parallel to section 153. It applies only to a company about to be or in the course of being wound-up, while section 153 applies to a company which is a going concern as well as in the course of a winding-up. The difference between the two sections is that under this section the assent of three-fourths in number and value of the creditors must be obtained, while under section 153 it is sufficient if the arrangement is agreed to by a majority in number representing three-fourths in value of the creditors present in person or by proxy. Again under section 153 the arrangement is not binding unless sanctioned by the Court, while under this section the sanction is not necessary but must only have been effected by an extraordinary resolution.

216. (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound-up by the Court.

Power to apply to Court to have questions determined of powers exercised.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding-up.

Such application shall be made—

(n) *Contal Radio Ltd.* (1932) 2 Ch. 66.

- 217.** (a) If the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and
- (b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind-up the company.
- (3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

Power to apply to Court in voluntary winding-up:—This section enables the liquidator, creditor or contributory to apply to the Court to determine any question fairly arising in the winding-up^(o), or to exercise all the powers which the Court would have if the company were being wound up by the Court. Thus, the Court may make an order for the examination of any person if it is satisfied that it will be just and beneficial for the purposes of the winding-up^(p). It may make an order for the inspection of all the books and papers of the company^(q), as well as stay proceedings in the winding-up with a view to the reconstruction of the company^(r). The Court may in like manner, stay further proceedings in execution of a decree obtained against the company, though this is a power which in compulsory winding up does not exist, because the statute itself forbids execution being taken out^(s). The jurisdiction is purely discretionary and will be exercised whenever it is shown that the exercise of the power will be just and beneficial for the purposes of the winding-up.

217. All costs, charges and expenses properly incurred in the winding-up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be

Cost of voluntary winding up.

(o) Union Bank of Kingston-upon-Hull (1880) 13 Ch. D. 808.

(p) Heiron's Case (1880) 15 Ch. D. 139; Nowroji V. Sadaashiv (1919) 44 Bom. 459.

(q) Imperial Land Co of Marseilles (1882) W.N. 173.

(r) S. S. Titian Co. Ltd. (1888) 58. L.T. 178.

(s) Sri Yogashram Pharmacy Ltd. (1928) 50 All. 482; Westbury Twigg & Co. Ltd. (1892) 1. Q.B. 77.

payable out of the assets of the company in priority to S. 217. all other claims.

Costs of voluntary winding-up:—This section provides that all costs, charges and expenses properly incurred in the winding-up, including the remuneration of the liquidator shall, subject to the rights of secured creditors, be paid before all other claims. But when the assets of a company in voluntary liquidation are insufficient to discharge its liabilities the Court has power to make an order in the exercise of its discretion, as to the payment thereof of the costs, charges and expenses (including the liquidator's remuneration) in such order of priority as it thinks just^(t). Where on the petition of a creditor an order is made continuing the voluntary winding-up under the supervision of the Court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioners costs of obtaining the order; but those costs are payable in priority to the costs of the liquidator incurred subsequently to the order^(u). He is entitled to costs incurred between the date of a resolution to wind up and the date of a compulsory order^(v). The costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding-up, are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs or that the costs be paid out of the assets of the company or that the liquidator do pay the costs with liberty to recoup himself out of the assets^(w). The costs are not merely proveable in the liquidation but are payable in full out of the assets of the company^(x).

A liquidator is not personally responsible to the solicitor employed by him in any affairs of the liquidation, for any costs incurred therein. The reason is that the solicitor gives credit to the assets. His exertions entitle him when there are assets to be paid every farthing of the costs that have been in-

(t) *Beni-Felkai Mining Co. Ltd.* (1934) 1 Ch. 406.

(u) *New York Exchange Co.* (1893) 1 Ch. 371.

(v) *William Adler & Co.* (1935) 1 Ch. 138.

(w) *Pacific Coast Syndicate Ltd.* (1913) 2 Ch. 26; *Manecklal V. Suryapur Mills Co. Ltd.* (1927) 52 Bom. 477.

(x) *Madrid Bank V. Pelly* (1869) L.R. 7 Eq. 442.

S. 218. curred in the liquidation, but he has no right whatever to recover costs against the liquidator. His only right against the liquidator is that he is entitled to be paid his costs in priority to any remuneration that the liquidator might otherwise claim^(y).

The section has been amended so as to accord with the decision in *Perry v. Oriental Hotels Company*^(z), where it was held that the costs of the liquidator could not be paid out of the assets which had been charged for the payment of secured creditors, but that in cases where the liquidator has incurred costs for the realisation or preservation of the property, they are payable out of the fund in priority to any claim of a secured creditor or of the debentureholders.

218. The winding-up of a company shall not bar the right of any creditor or contributory to have it wound-up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding-up.

Saving for
rights of credi-
tors and con-
tributories.

Voluntary winding-up not a bar to compulsory liquidation:—This section gives to any creditor or contributory a right to apply to the Court for a compulsory winding-up order. But in the case of an application by a contributory the section enacts that it must be shown that his rights would be prejudiced by a voluntary winding-up. In the case of an application by a creditor also, the Courts have acted on the same principle, and in the absence of proof that his rights would be prejudiced by a voluntary winding-up an application for a compulsory winding-up is not generally entertained. It is only when a creditor cannot get his debt paid out of the assets of the company that it is his right *prima facie* to have an order for the winding-up of the company by the Court^(a). The Court will not make a compulsory winding-up order where there is no sufficient evidence that any benefit would thereby result to anyone^(b).

(y) *Trumann's Estate* (1872) L.R. 14. Eq. 228.

(z) (1871) 12. Eq. 126.

(a) *Bank of Australia* (1895) 1 Ch. 578.

(b) *National Co. Etc. by Secondary Generators Ltd.* (1902) 2 Ch. 34.

Creditor's petition:—Orders for a compulsory winding-up have been made on the petition of a creditor in the following cases:—

- (a) where charges have been made against a company of having committed frauds connected with the formation or promotion of the company^(c);
- (b) where a creditor could not get his debts paid out of the assets of the company^(d);
- (c) where it is shown that the liquidator does not protect the company's interest or that he is an unfit person preferring some creditors to others^(e);
- (d) where the rights of the creditors would be prejudiced by a voluntary winding-up^(f).

Contributory's petition:—The Courts have passed orders for compulsory winding-up on the application of a contributory in the following cases:—

- (a) where the substratum of the company was gone and the special resolution for voluntary liquidation owed its existence to the preponderating influence of those whose conduct required to be investigated^(g);
- (b) where an amalgamation was eminently unfair to a minority of shareholders and the resolution was passed by means of a large majority of shares held by one company which alone benefited by the scheme^(h);
- (c) where the transactions disclosed are so suspicious that they ought to be investigated⁽ⁱ⁾;
- (d) where frauds were perpetrated in the course of the business of the company or in the course of a voluntary winding-up^(j);

(c) Medical Battery Co. (1894) 1 Ch. 444.

(d) Bank of Australia (1895) 1 Ch. 578.

(e) New York Exchange Ltd. (1888) 39 Ch. D. 415.

(f) Sansar Chand V. Karam Chand Inayat Ullah (1925) 6 Lah. 340.

(g) Varieties Ltd. (1893) 2 Ch. 235.

(h) Consolidated South Rand Mines Deep Ltd. (1909) 1 Ch. 491.

(i) Inecto Ltd. (1922) 38. T.L.R. 797; Gutta Percha Corporation (1900) 2 Ch. 665.

(j) Haycroft Gold Reduction & Mining Co. (1900) 2 Ch. 230.

S. 221. (e) where a petition presented by a contributory was supported by creditors^(k);

(f) where the proceedings in the voluntary winding-up were dilatory and unsatisfactory^(l).

219. Sections 207 to 218 were substituted for the original sections 207 to 219 by sec. 105 of the Indian Companies (Amendment) Act, 1936 (XXII of 1936).

220. Where a company is being wound-up voluntarily, and an order is made for winding-up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding-up.

Power of Court to adopt proceedings of voluntary winding up.

Adopting of proceedings in voluntary winding-up:—

Where a voluntary winding-up is superseded by a compulsory winding-up order, the Court may adopt all or any of the proceedings in the voluntary winding-up. Where such an order is made it does not avoid all proceedings taken under a previous resolution for voluntary winding-up^(m). The Court may thus adopt the 'B' list of contributories settled in the voluntary winding-up so as to prevent them from escaping liability and may also allow all costs properly incurred in the voluntary winding-up⁽ⁿ⁾.

Winding up subject to the supervision of Court.

221. When a company has by special or extraordinary resolution resolved to wind-up voluntarily, the Court may make an order that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

Power to order winding up subject to supervision.

Winding-up subject to the supervision of the Court:—

This section provides that when a company has by special

(l) *The Fire Annihilator Co.* (1863) 32, Beav. 561.

(m) *Thomas V. Patent Lionite Co.* (1881) 17 Ch. D. 250.

(n) *William Adler & Co.* (1935) 1 Ch. 138.

or extraordinary resolution resolved to wind up voluntarily, **S. 221.** the Court may, on the application of a creditor or contributory make an order continuing the voluntary winding-up under the supervision of the Court. The jurisdiction to make the order is purely discretionary. But in exercising this discretion the Court, may, under section 223 have regard to the wishes of the creditors or contributories ascertained by convening meetings under section 239. Usually the Court will not, at the instance of contributories, interfere with the voluntary winding-up by ordering it to continue under supervision, unless there has been fraud or undue influence in passing the resolution^(o). So far as the Court does not interfere, a winding-up under supervision remains essentially a voluntary winding-up. But the Court in a winding-up under supervision has full authority to interfere to exercise to any extent the power which it might have exercised if an order had been made for winding up the company by the Court^(p).

The advantages of obtaining a supervision order are:—

- (1) No suit or other legal proceedings shall be proceeded with or commenced against the company, except with the leave of the Court (Vide section 171).
- (2) The Court may by the same or any subsequent order appoint an additional liquidator to act along with the liquidator appointed by the Court (Vide section 224 (1)).
- (3) Every disposition of the property of the company and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up shall be void (Vide section 227 (2)).
- (4) Any attachment, distress or execution put in force without leave of the Court against the estate, or any sale of any of the properties of the company without leave of the Court shall be void (Vide section 232 (1)).

(o) London & Mercantile Discount Co. (1865) 1 Eq. 277.

(p) The Carwar Co. Ltd. (1882) 6 Bom. 640.

S. 224. **222.** A petition for the continuance of a voluntary winding-up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding-up by the Court.

Effect of petition for winding up subject to supervision.

223. The Court may, in deciding between a winding-up by the Court and a winding-up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

Court may have regard to wishes of creditors and contributories.

224. (1) Where an order is made for a winding-up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

Power for Court to appoint or remove liquidators.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

Power for Court to appoint or remove liquidators:—

Where the Court makes a winding up order subject to supervision, the Court may appoint an additional liquidator to act along with the existing liquidator. The liquidator appointed by the Court must give security, though no security has been given by the voluntary liquidator^(q). Where the Court has not restricted the exercise of his powers he has power to enter into arrangements with the sanction of meetings of the contributories, and the sanction of the Court is

(q) *Hamshire Land Co.* (1894) 2 Ch. 632.

not necessary to enable him to enter into the arrangement^(r). **S. 226.**
But the Court may place restrictions on the liquidator's powers if the creditors desire it, analogous to those which the Legislature has imposed upon an official liquidator in a voluntary winding-up^(s).

The Court has also power to remove any liquidator so appointed by the Court and may fill any vacancy occasioned by the removal, or by death or resignation.

225. (1) Where an order is made for a winding-up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

Effect of supervision order.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding-up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding-up, subject to the supervision of the Court.

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding-up by the Court, the Court may, by the last-mentioned order or by any

Appointment in certain cases of voluntary liqui-

(r) *Anglo-Romano Water Co.* (1870) 5 Ch. App. 437.

(s) *Watson & Sons Ltd.* (1891) 2 Ch. 55.

S. 227.

dators to office
of official liqui-
dators.

subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding-up by the Court.

Appointment of voluntary liquidators to office of official liquidators—This section provides that where an order has been made for the winding-up of a company subject to the supervision of the Court, and subsequently another order is made for a compulsory winding-up, the Court may appoint the voluntary liquidators or any of them appointed by the company, either provisionally or permanently, to be the official liquidators in the winding up by the Court.

Supplemental Provisions

227. (1) In the case of voluntary winding-up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding-up shall be void.

Avoidance of
transfers, etc.,
after commence-
ment of wind-
ing up.

(2) In the case of a winding-up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding-up shall, unless the Court otherwise orders, be void.

Avoidance of transfer after commencement of winding-up—This section avoids all dispositions of the property, effects and things in action of the company made between the commencement of the winding-up and the order for winding-up, unless the Court otherwise orders. The section contains a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard the improper alienation and dissipation of the property of a company in *extremis*^(t). The Court will however, sanction under

(t) Oriental Bank Corporation (1885) 28 Ch. D. 634.

sub-section (2) any *bona fide* transactions carried out and **S. 227.** completed in the ordinary course of current business. This power is given for the benefit and in the interest of the company, so as to assure that a company which is made the subject of a winding-up petition may nevertheless obtain money necessary for carrying on its business and so avoid its being paralysed. But the Court will not allow the assets of the company to be disposed of at the mere pleasure of the company and thus cause the fundamental principle of equality amongst its creditors to be violated. Thus it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow-creditors, as all debts must be paid *pari passu*^(u).

Every transfer of shares in a company made after the commencement of the winding-up, whether the winding-up is compulsory, under supervision or voluntary, shall be void unless sanctioned by the Court in the case of a winding-up by or subject to the supervision of the Court, or by the liquidator in a voluntary winding-up. The liquidator has power to sanction a transfer of shares made after the commencement of a winding up and this involves the power to alter and rectify the register of members. The transferor is thereupon released from liability which he was under at the commencement of the winding-up, and the transferee alone is the person to be placed on the A list of contributories.^(v) The liquidator may sanction the transfer on such terms as he thinks fit, e.g., upon the terms that the interest of the company which he is bound to protect should in no way be prejudiced by the transaction^(w). The section renders void and not illegal only a transfer of shares but not of debentures. The right, therefore, to transfer and to have the transfer of a debenture registered is not affected either by a winding up order or by a judgment in the action^(x).

As between the parties however, to a contract for the purchase of shares, the section has no application, and therefore a contract entered into but not completed before the

(u) *Tulsidas Jasraj V. The Industrial Bank of Western India* (1930) 32 Bom. L.R. 953.

(v) *Taylor, Philips & Rickard's Case* (1897) 1 Ch. 298.

(w) *Clev V. Financial Corporation* (1873) 16 Eq. 363.

(x) *Farmer V. Goy & Co.* (1900) 2. Ch. 149.

S. 227. presentation of the petition for winding-up is perfectly valid^(y). And though a transfer of shares made after the commencement of the winding-up is void as between the company on the one hand and the parties to the transaction on the other, it is valid as between the transferor and the transferee^(z). In such a case however, the transferee is not as of right entitled to be registered as the owner of the shares without the sanction of the Court; the Court has power to order the rectification of the register by insertion of such transferee's name, but the exercise of the power is discretionary and will not be made except on strong grounds^(a). And in cases where the transfer has been effected with knowledge that a winding-up petition has been presented, the Court will refuse to sanction the transfer if the transferee did not in fact know of the petition for winding-up^(b). Where however, a transfer of shares is made *bona fide* and for the purpose of preventing the ruin of the company, the Court will in the exercise of its discretion confirm such transaction.^(c)

But where there is only an agreement to sell shares, the Court will not order specific performance of the agreement, even though the agreement was entered into in ignorance that a petition for winding up the company has been presented^(d). *Bona fide* dispositions of the property of a company in the ordinary course of trade made after the presenting of a petition for winding up and completed before the winding up order will, as of course, in the exercise of the discretion given to the Court be protected^(e). But if such dispositions are incomplete and rest in contract only at the time of the winding-up order, the Court has no discretionary power to order them to be fulfilled. The person with whom it has been entered into though he has paid his money has only a general claim as a creditor for damages in respect of the breach of contract^(f). The section has no application in cases where a debtor makes a payment of money to the company. But the

(y) *Chapman V. Shepherd* (1867) L.R. 2 C.P. 228

(z) *Rudge V. Bowman* (1868) 3 Q.B. 689.

(a) *Onward Building Society* (1891) 2 Q.B. 463.

(b) *Rudge V. Bowman* (1868) 3 Q.B. 689.

(c) *Gibb's & West's Case* (1870) 10 Eq. 312.

(d) *London, Hamburg & Continental Exchange Bank* (1866) 1 Ch. App. 433.

(e) *Wiltshire Insurance Co.* (1868) 3 Ch. App. 443.

(f) *Ex Parte Pearson* (1868) 3 Ch. App. 443.

section applies where the company make a *bona fide* payment to a debtor after the commencement of the winding-up; the reason being, that the creditor must have received payment with notice of the presentation of the petition^(g). And the rule is the same where directors make improper payments after the presentation of the petition. In such a case, the directors themselves are also personally liable for the money so paid away^(h).

228. In every winding-up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

Debts proveable in winding-up of solvent companies:—
This section applies to solvent companies only and states what debts may be proved in the winding-up of such companies. Debts of all descriptions may be proved, including debts payable on a contingency, as well as all claims present or future, a just estimate being made of debts or claims which are contingent and do not bear a certain value. A pension granted to an employee of a company is in the nature of an annuity, and may be valued and proved⁽ⁱ⁾.

Contingent claims:—A contingent claim for unliquidated damages is a proveable debt and its amount has to be estimated as at the date of the winding up order. If when the claim is lodged the contingency has not happened, the amount of the claim must be estimated as accurately as possible. Where the contingency happens before the proof is lodged that fact is *pro tanto* evidence of the true value of the claim at the date of the winding-up order. If the contingency hap-

(g) Civil Service & General Store Ltd. (1

(h) Neath Harbour Smelting Works (1887) 56-L.T. 727.

(i) Profits & Income-Tax Insurance Co. Ltd. (1929) 1 Ch. 262.

S. 229. pens after the proof is lodged and it appears that the amount at which the damages have been estimated is below the true value, the creditor will be allowed to amend his proof and lodge a fresh proof^(j). A creditor is allowed to come in and prove for his debt as long as there are assets, but not so as to disturb prior dividends^(k).

229. In the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section.

Application of
insolvency rules
in winding up
of insolvent
companies.

Debts proveable in winding-up of insolvent companies:—

This section applies to the winding-up of insolvent companies the rules in force relating to insolvency, regarding the following matters, namely:—

- (1) The respective rights of secured and unsecured creditors;
- (2) debts proveable;
- (3) mutual credits and set-off;
- (4) the valuation of annuities and future and contingent liabilities; and
- (5) interest on debts.

(1). Rights of secured creditors:—A secured creditor is one who holds a mortgage or charge (whether fixed or floating) or a lien on the property of the company, or who has obtained a security in some way or other on the property of

(j) *Ellis & Co's Trustee V. Dixon Johnson* (1924) 1. Ch. 342.

(k) *Royal Bank of Australia* (1860) 2 Giff. 42.

the company. The present section applies to insolvent companies the insolvency provisions as to proof by secured creditors which are contained in rules 9 to 16 of the II Schedule to the Presidency Town Insolvency Act 1909 and section 47 of the Provincial Insolvency Act 1920. Under those rules a secured creditor has several alternative open to him, viz.,

- (a) he may realise his security and prove for the balance;
- (b) he may surrender his security and prove for the whole debt;
- (c) he may assess his security at a certain value and prove for the deficiency, but in such a case the liquidator may redeem the property on payment of the assessed value; or
- (d) he may rely on his security and not prove for the debt at all.

No secured creditor need, nor can he be forced to, prove his debt, and except that every secured creditor must obtain leave to proceed from the winding-up Judge, such a creditor can stand wholly outside the winding-up proceedings if he so elects and rely upon his security or his decree, if he has obtained one⁽¹⁾.

Where a person does not adopt any one of the four courses open to him, he is excluded from all share in any dividend. But in cases of inadvertence, the winding-up Court may allow a secured creditor to amend his proof^(m).

(2) Debts provable:—This section applies to all companies which are insolvent unless it is proved that the assets are sufficient to pay the debts in full as well as the expenses of the winding-up⁽ⁿ⁾. As the object of the Act is a *pari passu* distribution, the liquidator has to issue an advertisement fixing a time for the creditors to send in their claims and the particulars thereof. It is his duty to find out from the books and papers of the company as to who are the creditors, and if

(1) *Hansraj V. Dehra-Dun Mussorie Electrical Tramway Co.* (1929) 51 All. 695.

(m) *Henry Lister & Co.* (1892) 2 Ch. 417.

(n) *Milan Tramways Co.* (1884) 25 Ch. D. 587.

S. 229. any creditor omits to put in his claim the liquidator must communicate with him^(o). In cases where debts or claims have not been allowed he must give them notice that they are required to come in and prove their claims by a day stated in the said notice^(p). Where a creditor has lodged his claim but the liquidator has not allowed it in full the creditor's only remedy is to appeal to the winding up Court; he is not entitled to bring an action for the full amount of the claim^(q).

(3) **Mutual credits and set-off:** Where there are mutual dealings between a party and a company which subsequently goes into liquidation, the party being in the position of a creditor, an account has to be taken of what is due to the one from the other in respect of such mutual dealings, although the debts may be unconnected with each other. In such cases the balance of the account and no more, has to be paid^(r). But a contributory cannot claim a set-off for any debt or dividend due to him against unpaid calls. The right of set-off is not limited to ascertained sums only, existing at the date of the winding-up but also includes claims for unliquidated damages. It is enough if there exists at the commencement of the winding-up a debt on the one hand, and a liability which in due course would mature into a debt on the other^(s). The section applies only in cases where there is a mutuality of debts and not in each and every case. Thus a joint debt cannot be set-off against a joint and several debt, and the mere fact that a suit could lie against one of two joint debtors makes no difference^(t). Neither can a debt due from the company to the defendant previous to the resolution for winding up be set-off against a debt incurred by the defendant to the company after the resolution for winding up^(u). The right of set-off does not exit when the right to it is either expressly or impliedly excluded by the nature of the transaction, e.g., where there is a distinct promise by

(o) *Pulsford V. Devenish* (1903) 2 Ch. 625.

(p) *Aynek Syndicate Ltd.* (1936) 1 All. E. R. 406.

(q) *Craven V. Blackpool Greyhound Stadium Ltd.* (1936) 3 All. E. R. 813.

(r) *Krishna Chandra Bhowmik V. Pabna Dhanabandar Co. Ltd.* (1932) 62 Cal. 298.

(s) *Daintrey* (1900) 1 Q.B. 546; *Lee & Chapman's Case* (1885) 30 Ch. D. 216.

(t) *Sardar Gokhale V. Ramchandra Kirtane* (1921) 45 Bom. 1219.

(u) *Sankey Brook Coal Co Ltd, V. Marsh* (1871) 6. Ex. 185

a company that they will pay to the order of any person **S. 229.** named^(v).

The provision as to mutuality of debts applies only as between the company and its creditor who is at the same time a debtor of the company. Where there is an assignment of the debt and the assignment is complete as between the company and their assigns, there is no mutual credit or mutual debt between the company and the assignee, and the latter has no right of set-off notwithstanding the provisions of any agreement between the assignor and the company^(w). In an action by a liquidator for a debt, the defendant may set-off a claim for unliquidated damages and may, without leave of the Court in the winding-up raise that defence by counter claim^(x). But if the Court finds that it would be inequitable to allow the company a right of set-off, it may give separate judgments on the claim and counter-claim respectively^(y).

(4) Valuation of Annuities and future and contingent liabilities: See notes under section 228 under the heading "Contingent Claims".

(5) Interest on debts: Once a winding-up order is made, creditors are entitled to receive interest only upon what was due to them for principal and interest at the date of the winding-up. It is only in the event of their being a surplus after paying off all creditors, that they are entitled to claim for interest subsequent to the date of the winding-up order^(z). Where there are surplus assets, they are applicable first towards the payment of interest and next in the reduction of principal^(a). In a voluntary winding-up, interest ceases to run from the date of the resolution authorising the winding-up^(b).

On secured debts interest does not stop running whether the winding-up is compulsory or voluntary, and the credi-

(v) *General Estates Co.* (1868) 3. Ch. App. 758.

(w) *Stephenson's Case* (1926) 1 Ch. 191.

(x) *Mersey Steel & Iron Co. Ltd. V. Naylor, Benzon & Co.* (1882) 9 Q.B.D. 648.

(y) *Provincial Bill Posting Co. V. Low Moor Iron Co.* (1909) 2 K.B. 344.

(z) *Humber Ironworks & Shipbuilding Co.* (1869) 4. Ch. App. 643.

(a) *Sabapathy Rao V. Sabapathy Press* (1931) 54 Mad. 324.

(b) *Thomas Salt & Co.* (1908) 98. L.T. 588.

S. 230. tor is entitled to realise both principal and interest upto the whole value of the security.

230. (1) In a winding-up there shall be paid in priority to all other debts—

- P r e f e r e n t i a l
p a y m e n t s .**
- (a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;
 - (b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant;
 - (c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date;
 - (d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company;
 - (e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and
 - (f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act).

(2) The foregoing debts shall—

- (a) rank equally among themselves and be paid in full, unless the assets are insuffi-

cient to meet them, in which case they **S. 230.**
shall abate in equal proportion; and

- (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof:

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

- (a) in the case of a company ordered to be wound-up compulsorily which had not previously commenced to be wound-up voluntarily, the date of the winding-up order; and
- (b) in any other case, the date of the commencement of the winding-up.

Preferential payments:—This section enumerates the debts and liabilities which shall be payable in priority

S. 230. to all other debts in the winding-up of a company. Clauses (d), (e) and (f) are new and have been added by the Amendment Act of 1936. According to sub-section (2) the debts mentioned in sub-section (1) clauses (a) to (f) rank equally among themselves and are payable in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions between themselves, and have also priority over the claims of holders of debentures under any floating charge created by the company, and shall be paid out of any property comprised in or subject to the charge. Where therefore, money has been paid to a debenture holder under a floating charge, the liquidator may sue in the name of the company for the recovery of the money so paid, in order to enable him to meet the claims of preferential creditors who have not been paid^(c).

The priorities given by this section are the only priorities recognised by this Act, and under section 129 also as against ordinary creditors and debentureholders under a floating charge when the company is not in the course of being wound up. Even then these preferential debts cannot have priority over the claims of other secured creditors who have nothing whatever to do with the liquidation^(d).

Clause (a): Crown debts: The Crown has priority only as regards the debts mentioned in clause (a). As regards other debts there is no priority, and the Crown must rank for payment just like an ordinary individual^(e). Thus, the Crown is not entitled to claim priority in respect of income tax which has been deducted by the company from the interest which is paid to its mortgagee and which has not been paid over to the Crown^(f).

Clause (b): Wages or salary of any clerk or servant: Whether a person is or is not a clerk or servant depends upon the facts of each particular case. Where a person does not work at the company's place of business and is not exclusively employed by the company but is only bound to do a parti-

(c) *Westminster Corporation v. Chapman* (1916) 1 Ch. 161.

(d) *Hansraj V. Dehra-Dun Mussorie Electric Tramway Co.* (1929) 51 All. 695.

(e) *Damagoria Coal Co.* (1913) 59 Cal. 327.

(f) *Lang Propeller Ltd.* (1926) 1 Ch. 585.

cular class of work and specially where he is not working **S. 230A.** under the control or subject to the commands of the company, these four circumstances would prevent a person from being a clerk or servant within the meaning of this section^(g). A managing director is not a clerk or servant within the meaning of this section^(h). But a director whose services have been engaged in some other capacity, e.g., as an editor of a newspaper belonging to the company is a clerk or servant⁽ⁱ⁾. A secretary of a company is a clerk or servant, but not if he does not give his whole time to the service of the company, but gets his duties discharged by a clerk appointed and paid by him^(j). Salary does not mean a fixed amount of money per month but also includes payment by way of commission^(k).

A mere contributor to a newspaper although paid by a fixed salary every month is not a clerk or servant^(l). Nor can an independent contractor be deemed a clerk or servant within the meaning of this section^(m).

Clause (e) : Sums contributed to Provident Fund : Where a company creates a provident fund to which all the employees of the fund make their contributions, if the company goes into a winding up the members of the fund are entitled to rank as preferential creditors⁽ⁿ⁾.

230A. (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured

Disclaimer of property.

(g) *Ashley & Smith Ltd.* (1918) 2 Ch. 378.

(h) *Newspaper Proprietary Syndicate Ltd.* (1900) 2 Ch. 349.

(i) *Beeton & Co. Ltd.* (1913) 2 Ch. 279.

(j) *Cairney v. Black* (1906) 2 K.B. 746.

(k) *Earle's Shipbuilding Co.* (1901) W.N. 78.

(l) *Beeton & Co. Ltd.* (1913) 2 Ch. 279.

(m) *General Radio Co. Ltd.* (1929) W.N. 112.

(n) *Fazalbhoy Mills Ltd.* (1936) 38 Bom. L.R. 541; *Alliance Bank of Simla* (1924) 28 Cal. 721; *Maneckji Pettit Mfg. Co.* (1931) 34. Bom L.R. 728; *Shaw Wallace v. Amritsar National Bank* (1926) 7 Lah. 155.

S. 230A. to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twentyeight days after the receipt of application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid, does not within

the said period or further period disclaim the contract, S. 230A. the company shall be deemed to have adopted it.

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose:

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person—

- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
- (b) if the Court thinks fit, subject only to the same liabilities and obligations as if the

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lease had been assigned to that person at that date;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.

Power to disclaim onerous property:—This section is new and has been inserted by the amendment Act of 1936 and empowers the liquidator to disclaim any onerous property of the company with the leave of the Court. The disclaimer may be made by writing signed by him at any time within twelve months after the commencement of the winding-up or within such extended time as may be allowed by the Court. But he shall not be entitled to disclaim where an application in writing has been made to him requiring him to decide whether he will or will not disclaim the property, and the liquidator has not, within a period of twenty-eight days from the date of receipt of the said application given notice to the applicant that he intends to apply to the Court for leave to disclaim. Where an application is made by the liquidator the Court is not bound to sanction it, but is entitled to consider the effect of the disclaimer on persons interested

in the property. Thus, where the effect of the disclaimer would cause substantial injury to persons interested, the Court may in the exercise of its discretion refuse to allow the liquidator to disclaim the property^(o). **S. 231.**

The liquidator has also power with leave of the Court to disclaim any contract which has been entered into with the company. But the mere fact that he does not exercise the right to disclaim, does not render him personally liable in cases where he elects to perform a contract of the company^(p).

Although the disclaimer operates to determine from the date of the disclaimer the right, interest and liability of the company in respect of the property disclaimed, such disclaimer shall not affect the rights or interests of any other persons. Thus, if a person has guaranteed the performance of a contract by the company and the liquidator has elected to disclaim the contract, although the interest and liability of the company determines from the date of the disclaimer, the liability of the surety is not affected by the disclaimer. But by virtue of sub-section (7) the person injured by the operation of a disclaimer shall be deemed to be a creditor of the company to the amount of the injury suffered by him and shall be entitled to prove for the amount as a debt in the winding-up.

231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up, in the case of a winding up by or subject to the supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(o) *Katherine et Cie* (1932) 1. Ch. 70.

(p) *Stead, Hazel & Co.* (1933) 1 K.B. 840.

S. 231. (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Fraudulent preference:—This section applies to the winding up of an insolvent company the provisions of section 56 of the Presidency Towns Insolvency Act 1909 and section 54 of the Provincial Insolvency Act 1920 relating to fraudulent preference. The object of the Act being a distribution of the assets *pari passu*, the effect of this section is to render invalid any transfer, payment, delivery of goods, execution or other act by or against a company which would have amounted to a fraudulent preference if the same were done by an individual. In order to constitute an act a fraudulent preference it must be shown,

- (1) that the company was at the date of the transaction unable to pay its debts as they became due;
- (2) that the transaction was made in favour of a creditor;
- (3) that it was made with the intention of preferring that creditor to some other, and
- (4) that the transaction took place within three months of the presentation of the petition in the case of a winding up by or subject to the supervision of the Court, or that a resolution for voluntary winding up was passed within three months of the said transaction^(q).

Where a voluntary winding-up is superseded by a compulsory winding-up or under the supervision of the Court, the transaction which is impeached as a fraudulent preference must have taken place within three months of the date of the presentation of the petition and not of the resolution for winding up^(r).

There must be sufficient evidence to show that the dominant object was to prefer one creditor to another. Where there is no such evidence or the evidence is capable of being ex-

(q) *Sharp V. Jackson* (1899) A.C. 419.

(r) *Russel Hunting Record Co.* (1910) 2 Ch. 78.

plained away, it is not competent for any one to say that the intention to prefer must be inferred^(s). Where a transaction is sought to be impeached as a fraudulent preference, the benefit of it accrues to the general body of creditors and not to the benefit of one class of them only^(t). A transaction between a company and its surety is as much fraudulent preference and is invalid under this section^(u). A payment of fees to a director by allowing him to set them off against the unpaid calls due by him is a fraudulent preference, if the transaction is effected within three months of the date of the winding-up^(v).

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Sub-section (3): A transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void. The transfer or assignment referred to may not be absolute but includes also a floating charge over all the assets of the company for the benefit of all its creditors^(w).

232. (1) Where any company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force without leave of the Court against the estate or effects or any sale held without leave of the Court of any of the properties of the company after the commencement of the winding up shall be void.

Avoidance of certain attachments, executions, etc.

(2) Nothing in this section applies to proceedings by the Government.

Executions, attachments, etc. after commencement of winding up:—This section provides that in cases where a company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force against the estate or effects of the company or any sale of the company's property shall be void, if it is made without the leave of the Court. But under section 171 the

(s) *Peat V. Gresham Trust Ltd.* (1934) A.C. 252.

(t) *Ram Sarup V. Jagat Ram* (1921) 2 Lah. 102; *Wilmott V. London Celluloid Co.* (1886) 31. Ch. D. 425.

(u) *Blackpool Motor Car Co.* (1901) 1 Ch. 77.

(v) *Washington Diamond Mining Co.* (1893) 3 Ch. 95.

(w) *London Joint City Bank V. Dickinson* (1922) W.N. 13.

S. 233. Court may give leave to commence or continue a suit or other legal proceedings on such terms as the Court may impose. The mere fact that leave has been granted to commence or continue a suit does not include leave to execute the decree obtained in the suit^(x). This can be done only with the leave of the Court. The object of the Act being a *pari passu* distribution, the Court is very reluctant to grant leave to execute a decree. But where a liquidator fails in a suit instituted by him, execution by the defendant for his costs will not be restrained^(y).

The section applies only in cases where the execution is sought to be effected after the company has gone into liquidation. Where a creditor has levied an execution before the company went into liquidation the section does not apply, for in that case he has acquired a valuable right, and the Court will not in general, disturb rights already acquired^(z).

233. Where a company is being wound up a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum.

Effect of floating charge:—This section renders invalid a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up, unless it is proved that the company was solvent immediately after the creation of the charge—except to the amount of any cash paid to the company at the time or subsequently to the creation of and in consideration for the charge, together with interest on that amount at the

(x) *Ishwardas V. Dhanjisha* (1892) 16 Bom. 644.

(y) *Bank of Hindustan, China & Japan* (1867) 5 Eq. 69.

(z) *Anantha V. Official Receiver* (1933) 60 I.A. 167; *Venner's Electric Cooking Co. Ltd. V. Thorpe* (1915) 2 Ch. 404; *Withernsea Brickworks* (1880) 16 Ch. D. 337.

rate of five per cent per annum. The mere fact that the balance sheet of the company shows that the assets exceed its liabilities does not show that the company, is solvent, if in fact, the company is unable to pay its debts as they become due^(a). In cases where a company goes into liquidation within three months of the creation of the floating charge, the burden of proving that the company was solvent immediately after the creation of the charge is on the person claiming a benefit under the charge. **S. 234.**

It is not a *sine qua non* to the validity of a floating charge that the whole of the cash to secure the payment of which the said charge is created should have in fact been paid in cash to the company. The floating charge is not rendered invalid even though a part of the sum to be advanced is to be applied in paying off a past debt due by the company to the person advancing the money^(b). But where a company gives a charge on certain specific assets and the company has power to dispose of those assets in the ordinary course of business but only subject to certain conditions, the charge is not a floating charge, and the provisions of this section do not apply^(c).

The effect of the section is only to render the charge invalid as against the creditors. It does not at all affect the liability of the company to repay the amount borrowed by it when the charge is avoided under the provisions of this section.

234. (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them:

*General scheme
of liquidation
may be sanc-

(i) pay any classes of creditors in full;

(a) Patrick & Lyton Ltd. (1933) 1 Ch. 786.

(b) Mathew Ellis Ltd. (1933) 1 Ch. 458.

(c) Jones & Co. Ltd. V. Ranjit Roy (1927) 54 Cal. 213; Bank of Baroda V. Shivdasani (1926) 50 Bom. 547.

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- (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable;
- (iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Power to compromise:—This section gives wide and extensive powers to the liquidator to effect compromises with creditors or contributories with the sanction of the Court in the case of a winding-up by or under the supervision of the Court, and with the sanction of an extraordinary resolution of the Company in the case of a voluntary winding-up. At the same time, sub-section (2) enables any creditor or contributory to apply to the Court with respect to any such proposed compromise. The Court has no power under this section to compel the liquidator to consent to a compromise with a creditor or contributory^(d). Neither is the Court competent to compel a minority of creditors or contributo-

(d) *Hankey's Case* (1872) 41 L.J. Ch. 385.

ries to agree to a compromise against their will^(e). But the Court may, in the exercise of its discretion give sanction to the compromise of calls as well as the debts and liabilities, even before the list of contributories has been settled^(f). **S. 235.**

235 (1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

Power of Court to assess damages against delinquent directors, etc.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

Misfeasance proceedings:—It sometimes happens that promoters, directors, managers, liquidators or other officers of a company have misapplied money or other property belonging to the company or for which they are liable to account to the company on account of their fiduciary character^(g). In such cases the present section provides a

(e) *Albert Life Assurance Co.* (1871) 6 Ch. App. 381.

(f) *Bank of Hindustan, China & Japan V. Eastern Financial Association* (1869) L.R. 2 P.C. 489.

(g) *Cavendish V. Fenn* (1887) 12 A.C. 652.

S. 235. summary mode of enforcing their liability by what are known as "Misfeasance proceedings". The section does not create any new liability, but only provides a summary remedy of enforcing rights which could otherwise have been enforceable by a regular suit^(h). The section does not apply in all cases where a company may have a right of action against any of the persons mentioned in the section but is limited only to cases where there has been something in the nature of the breach of duty which has entailed a pecuniary loss to the company⁽ⁱ⁾.

Persons to whom the section applies:—The persons against whom proceedings may be taken under this section are the promoters, any past and present director, manager or liquidator or any officer of the company. The section applies not only to directors and other officers of the company *de jure* but also *de facto*^(j). The bankers of a company are not officers within the meaning of the section^(k). A solicitor appointed by the company for the doing of some work is not an officer within the section, but he would be an officer if he were appointed by the company at a fixed salary^(l). An accountant who has been casually appointed to audit the company's account and to prepare the balance sheet is not an officer within this section^(m). But an auditor appointed by the company is an officer and this section does apply to him⁽ⁿ⁾.

Who may apply under the section:—The liquidator is in the generality of cases the proper person to make an application under this section. With a view to enable him to do so the liquidator may resort to a private examination of the director or other person for the purpose of obtaining information concerning the trade, dealings, affairs or property of the company (Vide sec. 195). In the alternative, the liquidator may make an application to the Court stating that in

(h) *Cavendish V. Fenn* (1887) 12 A.C. 652.

(i) *Etic Ltd.* (1928) 1 Ch. 861.

(j) *Coventry & Dixon's Case* (1880) 14 Ch. D. 660.

(k) *Imperial Land Co. of Marseilles* (1870) 10 Eq. 298.

(l) *Liberator Permanent Building Society* (1894) 71 L.T. 406; *Carter's Case* (1886) 31 Ch. D. 496.

(m) *Western Counties Steam Bakeries & Milling Co.* (1897) 1 Ch. 617.

(n) *Kingston Cotton Mill* (1896) 2 Ch. 279; *London & General Bank* (1895) 2 Ch. 673; *Leeds Estate Building Co. V. Shepherd* (1887) 36 Ch. D. 787,

his opinion a fraud has been committed by any director or other officer of the company in the promotion or formation of the company or in relation to the company, and the Court may in such a case order that the person be publicly examined as to his conduct and dealings as director, manager or other officer thereof. (Vide sec. 196). Where the liquidator fails to apply, any creditor or contributory may present the application^(o).

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The application under this section must be made within three years of the first appointment of a liquidator in the winding up, or of the misapplication, retainer, misfeasance, or breach of trust as the case may be, whichever is longer.

In this connection it is well to remember the provisions of section 86 C which lays down that any provision whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager, or officer of the company, or any person employed by the company as auditor, from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void. But the Court may under section 281 grant relief to any such person where it is shown that he has acted honestly and reasonably and ought fairly to be excused for the negligence, default, breach of duty or breach of trust, and on such terms as the Court may think fit. And in cases where the members of a company have consented to and sanctioned a transaction, the directors cannot be held liable for misfeasance in respect thereof^(p).

Instances of misfeasance:—In the following cases directors and other officers have been held liable in misfeasance proceedings.

- (1) where the directors improperly paid out dividends to shareholders out of capital^(q);
- (2) where the directors had put themselves under the control of the promoters by holding their quali-

(o) National Funds Association. (1878) 10 Ch. D. 118.

(p) Ambrose Lake & Copper Mining Co. (1880) 14 Ch. D. 39.

(q) De Ruvigne's Case (1877) 5 Ch. D. 306.

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fication shares in trust for the promoters and given them blank transfers^(r);

- (3) where the directors paid out dividends under a false and delusive balance sheet^(s);
- (4) where the directors paid an improper bonus^(t);
- (5) where the directors accepted gifts from the promoters^(u);
- (6) where the directors made illegitimate profits by dealing with the company's shares^(v);
- (7) where the directors sold their property to the company without disclosure^(w);
- (8) where the directors did not make a call on themselves^(x);
- (9) where a director had by fraudulent misrepresentation induced his co-directors to advance him money belonging to the company on an insufficient security^(y);
- (10) where the directors had made a wilful sale of the company's assets at less than their proper value^(z);
- (11) where a director took shares in the name of his infant children who could not in the winding up, be placed on the list of contributories^(a);
- (12) where the directors had paid to the promoters a sum of money for preliminary expenses out of which the director's qualifications was provided^(b).

236. If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, papers or securities, or makes, or is privy to the making of

Penalty for falsification of books.

(r) London & South Western Canal (1911) 1 Ch. 346.

(s) Rance's Case (1870) L.R. 6 Ch. App. 104.

(t) National Funds Association (1878) 10 Ch. D. 118.

(u) Boston Deep Sea Fishing & Ice Co. (1888) 39 Ch. D. 337.

(v) Gluckstein V. Barnes (1900) A.C. 240.

(w) Cavendish V. Fenn (1885) 12 A.C. 652.

(x) Alexander V. Automatic Telephone Co. (1900) 2 Ch. 56.

(y) Exploring Land & Minerals Co. V. Kolckman (1905) 94 L.T. 234.

(z) New Travellers' Chambers (1895) 12 T.L.R. 529.

(a) Crenver & Co. (1873) 8 Ch. 45.

(b) Marzetti's Case (1880) 42 L.T. 206.

any false or fraudulent entry in any register book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine. **S. 237.**

237. (1) If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the Local Government for further inquiry, and the Local Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Local Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

S. 237. (4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding-up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court, may, on the application of any person interested in the winding-up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate General or the public prosecutor and if advised to do so institute proceedings:

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

(7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person

employed by the company as auditor, whether that person is or is not an officer of the company. **S. 238.**

(8) If any person fails or neglects to give assistance in manner required by sub-section (7), the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

Prosecution of delinquent directors:—In order to determine whether leave ought to be given to institute proceedings against the director of a company which is being wound-up, and whether the costs of the prosecution ought to be paid out of the assets of the company, the Court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen even at a loss to himself to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue^(c). Where an application has been made under this section, the Court is not bound to accede to the wishes of the parties who are interested in the winding-up. But at the same time, before it imperils the assets it is right to know what view the persons interested in those assets take^(d). The discretion conferred on the Court by this section with reference to directing the liquidator to prosecute its directors or members, in unshackled by any obligation of hearing evidence as to the propriety of a prosecution^(e).

238. If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposes falsely, or in any statement or solemn affirmation, in or about the winding-up of any company

(c) *London & Globe Finance Corporation Ltd.* (1903) 1 Ch. 278.

(d) *Northern Counties Bank Ltd.* (1883) 31 W.R. 546.

(e) *Charles Denham & Co.* (1884) 53 L.J. Ch. 1113.

S. 238A. under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Penal Provisions: This section is new and has been inserted by the Amendment Act of 1936. The section creates certain specific offences and prescribes penalties which vary with the gravity of the offences. As will be seen from the wording of the different clauses, the penal provisions for the most part relate to offences connected with a company which is in the course of being wound-up.

238A. (1) If any person, being a past or present director, managing agent, manager or other officer of a company which at the time of the commission of the alleged offence is being wound-up, whether by or under the supervision of the Court or voluntarily, or is subsequently ordered to be wound-up by the Court or subsequently passes a resolution for voluntary winding-up—

Penal provisions.

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company; or
- (b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up; or
- (c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging

to the company and which he is required S. 238A.
by law to deliver up; or

- (d) within twelve months next before the commencement of the winding-up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company; or
- (e) within twelve months next before the commencement of the winding-up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards; or
- (f) makes any material omission in any statement relating to the affairs of the company; or
- (g) knowing or believing that a false debt has been proved by any person under the winding-up, fails for the period of a month to inform the liquidator thereof; or
- (h) after the commencement of the winding-up prevents the production of any book or paper affecting or relating to the property or affairs of the company; or
- (i) within twelve months next before the commencement of the winding-up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company; or
- (j) within twelve months next before the commencement of the winding-up or at any time thereafter makes or is privy to the

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- making of any false entry in any book or paper affecting or relating to the property or affairs of the company; or
- (k) within twelve months next before the commencement of the winding-up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company; or
 - (l) after the commencement of the winding-up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding-up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
 - (m) has within twelve months next before the commencement of the winding-up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for; or
 - (n) within twelve months next before the commencement of the winding-up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
 - (o) within twelve months next before the commencement of the winding-up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and

has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company; or

- (p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding-up;

he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this sub-section, with imprisonment for a term not exceeding five years, and, in the case of any other offence, with imprisonment for a term not exceeding two years:

Provided that it shall be a good defence to a charge under any of clauses (b), (c), (d), (f), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i) and (j), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (o) of sub-section (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years.

239. (1) Where by this Act the Court is authorised in relation to winding up to have regard to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person

Meetings to ascertain wishes of creditors or contributories.

S. 239.

S. 240. to act as chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

Meeting to ascertain wishes of creditors or contributories:—It has been seen in section 174 that the Court may as to all matters relating to the winding-up have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. Similarly, under section 223 in deciding between a winding-up by the Court and a winding-up subject to supervision, in the appointment of liquidators and in all other matters relating to the winding-up subject to supervisions, the Court may have regard to the wishes of creditors and contributories, as proved to it, by any sufficient evidence. This section therefore, is auxiliary to sections 174 and 223. Where the Court is satisfied that there is good ground for making a winding-up order, the Court may direct a meeting to ascertain the wishes of the contributories as to how the company is to be wound up whether by or under the supervision of the Court^(f). The voluntary winding-up of a company is no bar to a compulsory order if the general body of creditors desire it, and for the purpose of ascertaining their wishes the Court may direct a meeting to be called and held under the provisions of this section^(g).

Documents of company to be evidence. **240.** Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

Company's documents to be evidence:—This section enacts that when a company is being wound up all documents of

(f) *Oriental Navigation Co. V. Bhanaram Agarwal* (1921) 49 Cal. 399.
(g) *E. Bishop & Sons, Ltd.* (1900) 2 Ch. 254.

the company and of the liquidators shall be *prima facie* **S. 241.** evidence as between the contributories of the company. The mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares was in fact made^(h). But in such cases the allotment book of the company is *prima facie* evidence against an applicant of an allotment of shares to him, and the entry of his name in the allotment book throws upon him the burden of proving that the allotment is invalid⁽ⁱ⁾. A director who is sought to be made liable as a contributory and whose name is entered in the register of members is thus entitled to show that he has not authorised his name to be put there^(j).

241. After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

Inspection of documents. **Inspection of documents:**—Once an order for winding-up a company by or subject to the supervision of the Court is made, the right of inspection given by section 36 of the register of members and of the index of members as well as the right to inspect the register of mortgages and charges under section 126 comes to an end, and inspection can be had only under an order of the Court. The section applies only to books and papers in the possession of the company and does not enable the Court to decide any question of right of third parties who have the books in their possession and claim to be entitled to such possession. The order for inspection will only to be made for the purposes of winding-up and for the benefit of those who are interested in the winding-up and will not in general be made for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters^(k). A clause in the com-

(h) Bellary Electric Co., Ltd. v Kanniram Rawoothermal (1932) 56 Mad. 391.

(i) Great Northern Salt & Chemical Co. (1890) 44 Ch. D. 472.

(j) Barangah Oil Refining Co. (1887) 36 Ch. D. 702.

(k) North Brazilian Sugar Factories (1887) 37 Ch. D. 83.

S. 243. pany's articles that the books of accounts should be open to the inspection of the shareholders during hours of business is no longer applicable when the company is under voluntary liquidation⁽¹⁾.

242. (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say):—

Disposal of documents of company.

- (a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs;
- (b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

243. (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

Power of Court to declare dissolution of company void.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty

(1) *Yorkshire Fibre Co.* (1870) 9 Eq. 650; *Morgan's Case* (1884) 2 Ch. D. 620.

rupees for every day during which the default continues. S. 244.

Power of Court to declare dissolution of company void:—

This section empowers the Court to declare a dissolution void on an application made within two years of the date of the dissolution, by the liquidator or by any other person interested. Thus, where after the dissolution of the company surplus assets are discovered, the Court may declare the dissolution void^(m). In such a case a notice to declare the dissolution void must be given to the Government solicitor, since on dissolution the undistributed assets pass to the Crown as *bona vacancia*. The same procedure is followed in cases where the registrar strikes the name of a company off the register⁽ⁿ⁾.

It shall be the duty of the person on whose application the order was made, within twenty one days after the making of the order, to file with the registrar, a certified copy of the order. But an order of the Court declaring the dissolution of a company to be void does not affect the validity of proceedings taken during the interval between the dissolution and its avoidance^(o).

244. (1) Where a company is being wound-up, if the winding-up is not concluded within one year after its commencement, the liquidator shall, once in each year and at intervals of not more than twelve months, until the winding-up is concluded, file in Court or with the registrar, as the case may be a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract

Information as to pending liquidations.

(m) *Henderson's Nigel, Ltd.* (1911) W.N. 159.

(n) *Home & Colonial Insurance Co., Ltd.* (1926) 44 T.L.R. 718.

(o) *Morris V. Harris* (1927) A.C. 252.

S. 244A. therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.

244A. (1) Every liquidator of a company which is being wound-up by the Court shall in such manner and at such times as may be prescribed, pay the money received by him into a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934:

Payments of li-
quidator into
bank.

Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed

from his office by the Court and shall be liable to pay **S. 246.** all expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound-up shall open a special banking account and pay all sums received by him as liquidator into such account.

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by the Governor General in Council, or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice-Consuls.

Court or person before whom affidavit may be sworn.

(2) All Courts, Judges, Justices, Commissioners and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

Rules.

246. (1) The High Court, may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding-up a company in such Court and in the Courts subordinate thereto, and for voluntary winding-up (both members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company and generally for all applications to be made

Power of High Court to make rules.

S. 247. to the Court under the provisions of this Act and shall make rules providing for all matters relating to the winding-up of companies which, by this Act, are to be prescribed.

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

- (a) holding and conducting meetings to ascertain the wishes of creditors and contributories;
- (b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;
- (c) requiring delivery of property or documents to the liquidator;
- (d) making calls;
- (e) fixing a time within which debts and claims must be proved:

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

of defunct Companies from

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he

shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the local official Gazette with a view to striking the name of the company off the register. **S. 247.**

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the local official Gazette, and send to the company by post a notice that at the expiration of three months' from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound-up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound-up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the local official Gazette and send to the company a like notice as is provided in the last preceding subsection.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the local official Gazette, and, on the publication in the local official Gazette of this notice, the company shall be dissolved: Provided that the liability (if any) of every director and member of the company shall con-

S. 247. tinue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

Removal of defunct companies from register:—This section gives power to the registrar to strike the name of a company off the register where he has reason to believe that a company is not carrying on business or in operation, or in the case of a company which is being wound-up where he has reason to believe that no liquidator is acting, or that the affairs of the company have been fully wound-up and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice demanding the same, has been given by the registrar. The effect of striking the name of a company off the register is to dissolve the company but the personal liability of the officers for the

engagements made as its agents is preserved, and the restoring of the name to the register does not relieve them from that liability. In order to relieve them from liability the Court must make an express order to that effect^(p). Before striking the name of the company off the register, the registrar must follow the procedure prescribed by this section. **S. 248.**

Sub-section (6) empowers the Court to order the name of a company which has been struck off to be restored to the register. The application for this purpose may be made by the company, or any member or creditor^(q). Where the Court makes an order restoring the name of the company to the register, the company shall be deemed to have continued in existence as if its name had not been struck off. The Court has power under this section, to restore the name of the company to the register even though the company was, at the time of striking off carrying on business only for the purpose of winding-up voluntarily^(r). Where the application for restoration is made by a member, the company should be added as a co-petitioner in order that it may give the undertakings required to make the necessary expenses^(s). Notice of the application for restoration must also be given to the registrar and the Government solicitor^(t).

PART VI. REGISTRATION OFFICE AND FEES.

248. (1) For the purposes of the registration of companies under this Act, there shall be offices at such places as the Local Government thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The Local Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(p) *Browne Bayley's Steel Works, Ltd.* (1905) 21 T.L.R. 374.

(q) *Conrad Hall & Co., Ltd.* (1916) 60 So. Jour. 666.

(r) *Outlay Assurance Society* (1887) 34 Ch. D. 479.

(s) *Walter Wright, Ltd.* (1923) 67 So. Jour. 577.

(t) *Home & Colonial Insurance Co., Ltd.* (1920) 44 T.L.R. 718.

S. 249. (3) The salaries of the persons appointed under this section shall be fixed by the Local Government.

(4) The Local Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Local Government, not exceeding one rupee for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the Local Government may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the Local Government otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such person as the Local Government may for the time being authorise; but, in the event of the Local Government altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Local Government may appoint.

249. (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified; or such smaller fees as the Governor General in Council may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown.

249A. (1) If a company, having made default in complying with any provision of this Act which requires it to file with, deliver or send to the registrar any return, account or other document, or to give notice to him of any matter, fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the Court may, on an application made to the Court by any member or creditor of the company or by the registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order. **S. 250.**

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.

PART VII.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

250. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

**Application of
Act to compa-
nies formed un-
der former
Companies
Acts.**

S. 253. Provided that—

- (1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882;
- (2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

251. This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Application of
Act to compa-
nies registered
but not formed

Companies
Acts.

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

252. A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

Mode of trans-

PART VIII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

Companies capable of being registered.

- (i) any company consisting of seven or more S. 253.

members, which was in existence on the first day of May, eighteen hundred and eighty-two including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and

- (ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or Act of the Governor General in Council other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound-up.

(2) Provided as follows:—

- (a) a company having the liability of its members limited by Act of Parliament or Act of the Governor General in Council or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;
- (b) a company having the liability of its members limited by Act of Parliament or Act of the Governor General in Council or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;
- (c) a company that it is not a joint-stock company as hereinafter defined shall not re-

S. 253.

gister in pursuance of this section as a company limited by shares;

- (d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose;
- (e) where a company not having the liability of its members limited by Act of Parliament or Act of the Governor General in Council or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;
- (f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound-up while he is a member, or within one year afterwards for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section. **S. 255.**

254. For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint-stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

**Definition of
"joint-stock
company".**

255. Before the registration in pursuance of this Part of a joint-stock company, there shall be delivered to the registrar the following documents (that is to say):—

**Requirements
for registration
by joint-stock
companies.**

- (1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;
- (2) a copy of any Act of Parliament, Act of the Governor General in Council, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and
- (3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say):—

S. 258.

- (a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;
- (b) the number of shares taken and the amount paid on each share;
- (c) the name of the company, with the addition of the word "Limited" as the last word thereof; and
- (d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

256. Before the registration in pursuance of this

Requirements
for registration
by other than
joint-stock
companies.

Part of any company not being a joint-stock company, there shall be delivered to the registrar—

- (1) a list showing the names, addresses and occupations of the directors of the company; and
- (2) a copy of any Act of Parliament, Act of the Governor General in Council, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and
- (3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

257. The list of members and directors and any other particulars relating to the company required to be

Authentication
of statement of
existing compa-
nies.

delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company.

258. The registrar may require such evidence as

Registrar may
require evi-

he thinks necessary for the purpose of satisfying himself whether any company

dence as to nature of company.

proposing to be registered is or is not a joint-stock company as hereinbefore defined. S. 262

259. (1) Where a banking company, which was in existence on the first day of May eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

On registration of banking company with limited liability, notice to be given to customers.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

260. No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Act of the Governor General in Council or by Letters Patent.

Exemption of certain companies from payment of fees.

261. When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as part of its name.

Addition of "Limited" to name.

262. On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under of Table B in the First Schedule, the registrar shall certify under his hand that the

S. 266. **existing companies.** company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

263. All property, moveable and immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

Vesting of property on registration.

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with or on behalf, of, the company before registration.

Saving of existing liabilities.

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding-up the company.

Continuation of existing suits.

266. When a company is registered in pursuance of this Part—

- (i) all provisions contained in any Act of Parliament, Act of the Governor General in Council, deed of settlement, con-

Effect of registration under Act.

tract of co-partnery, Letters Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;

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- (ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say):—
 - (a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;
 - (b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;
 - (c) subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of Parliament or Act of the Governor General in Council relating to the company;
 - (d) subject to the provisions of this section, the company shall not have power, without the sanction of the Governor General in Council, to alter any provi-

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- sion contained in any Letters Patent relating to the company;
- (e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company.
 - (f) in the event of the company being wound-up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the cost and expenses of winding-up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply;
- (iii) the provisions of this Act with respect to—
 - (a) the registration of an unlimited company as limited:

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- (b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding-up;
- (c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding-up;
- (d) shall apply notwithstanding any provisions contained in any Act of Parliament, Act of the Governor General in Council, Royal Charter, deed of settlement, contract and co-partnery, Letters Patent or other instrument constituting or regulating the company;
- (iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act;
- (v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, Act of the Governor General in Council, deed of settlement, contract of co-partnery, Letters Patent or other instru-

S. 268.

ment constituting or regulating the company, be vested in the company.

Power to substitute memorandum and articles for a deed of settlement.

267. (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications:—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum and articles; and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an Act of the Governor General in Council, a Royal Charter or Letters Patent.

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings

Power of Court to stay or restrain proceedings.

against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

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269. Where an order has been made for winding-up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

Suits stayed on winding up order.

PART IX.

WINDING-UP OF UNREGISTERED COMPANIES.

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Act of the Governor General in Council, nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

Meaning of unregistered company".

271. (1) Subject to the provisions of this Part, any unregistered company may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to an unregistered company, with the following exceptions and additions:—

Winding up of unregistered

- (i) an unregistered company shall, for the purpose of determining the Court having

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- jurisdiction in the matter of the winding-up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding-up, be deemed to be the registered office of the company;
- (ii) no unregistered company shall be wound-up under this Act voluntarily or subject to supervision;
 - (iii) the circumstances in which an unregistered company may be wound-up are as follows (that is to say):—
 - (a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs;
 - (b) if the company is unable to pay its debts;
 - (c) if the Court is of opinion that it is just and equitable that the company should be wound up;
 - (iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—
 - (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner

as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor; **S. 271.**

- (b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;
- (c) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf

S. 272.

of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British India it may be wound-up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated.

272. (1) In the event of an unregistered company being wound-up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding-up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

**Contributories
in winding up
of unregistered
companies.**

(2) In the event of any contributory dying or being adjudged insolvent, the provision of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply.

273. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

Power to stay or restrain proceedings.

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274. Where an order has been made for winding-up an unregistered company, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

Suits stayed on winding up order.

275. If an unregistered company has no power to sue and be used in a common name, or if for any reason it appears expedient, the Court may, by the winding-up order, or by any subsequent order, direct that all or any part of the property, moveable or immoveable, including all interests and rights in, to and out of property, moveable and immoveable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding-up the company and recovering its property.

Directions as to property in certain cases.

276. The provisions of this Part with respect to unregistered companies shall be in addition to, and not

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Provisions of
this Part Cu-
mulative.

in restriction of, any provisions herein-
before in this Act contained with respect
to winding-up companies by the Court,
and the Court or official liquidator may
exercise any powers or do any act in the case of un-
registered companies which might be exercised or done
by it or him in winding-up companies formed and re-
gistered under this Act; but an unregistered company
shall not, except in the event of its being wound up, be
deemed to be a company under this Act, and then only
to the extent provided by this Part.

PART X.

COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA.

277. (1) Every company incorporated outside
British India, which at the commencement of this Act
has a place of business in British India,
and every such company which after
the commencement of this Act establi-
shes such a place of business within Bri-
tish India, shall, within six months from
the commencement of this Act or within
one month from the establishment of such place of
business, as the case may be, file with the registrar in
the province in which such place of business is
situated,—

Requirements
as to companies
established out-
side British In-
dia.

- (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and managers (if any) of the company;

- (d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in any such address or in the directors or managers or in the names or addresses of any such persons as aforesaid the company shall, within the prescribed time, file with the registrar a notice of the alteration.

- (e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

- (i) in a case where by the law, for the time being in force, of the country in which the company is incorporated such company as required to file with the public authority an annual balance-sheet three copies of that balance-sheet and if the balance-sheet does not contain all the information provided for in the form marked 'H' in the Third Schedule, such supplementary statements in triplicate as shall furnish such information; or
- (ii) in a case where no such provision is made by the law, for the time being in force,

S. 277.

of the country in which the company is incorporated,—such a statement in triplicate in the form of a balance-sheet as such company would, if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act:

(4) Every company to which this section applies and which uses the word "Limited" as part of its name, shall—

- (a) in every prospectus inviting subscriptions for its shares or debentures in British India, state the country in which the company is incorporated; and
- (b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place; and
- (c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter paper, and in all notices, advertisements and other official publications of the company.

(5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all bill heads and letter paper notices, advertisements and other official publications of

the company in British India, and to be affixed on every S. 277A. place where it carries on business.

(6) If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of continuing offence, fifty rupees for every day during which the default continues.

(7) For the purposes of this section—

(a) the expression “certified” means certified in the prescribed manner to be a true copy or a correct translation;

(b) the expression “place of business” includes a share transfer or share registration office;

(c) the expression “director” includes any person occupying the position of director, by whatever name called; and

(d) the expression “prospectus” means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(8) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

277A. (1) It shall not be lawful for any person—

(a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established, or when formed will or will not establish,

Restriction on
sale and offer
for sale of
share.

S. 277A.

a place of business in British India, unless—

- (i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar;
 - (ii) the prospectus states on the face of it that the copy has been so delivered;
 - (iii) the prospectus is dated; and
 - (iv) the prospectus otherwise complies with this Part; or
- (b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part:

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture-holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if

the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 98A to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company. **S. 277A.**

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277B, the expressions 'prospectus', 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.

Restrictions on sale or offer of shares for sale:—Sections 277A to 277E are new and have been inserted by the Amendment Act of 1936. The present section renders unlawful the issue, circulation or distribution in British India of any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated out of British India, except in conformity with the provisions of this section. Section 277B requires such a company to state in the prospectus if any issued by it all the particulars specified in clauses (a) and (b) of sub-section (1). Section 277C renders it unlawful for any person under a penalty not exceeding Rs. 100/- to go from house to house offering shares of a company incorporated outside British India for subscription or purchase to any member of the public. Section 277D applies the provisions of sections 109 to 117 and 120 to 125 all inclusive to charges on property in British India which are created, and to charges on property within British India which

277B. are acquired, after the commencement of the Amendment Act of 1936, namely the 15th January, 1937, in cases where such a company has an established place of business in British India.

277B. (1) In order to comply with this Part a
 Requirements
 as to prospec-
 tus.
 a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 277A, must—

(a) contain particulars with respect to the following matters:—

- (i) the objects of the company;
- (ii) the instrument constituting or defining the constitution of the company;
- (iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected;
- (iv) an address in British India where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected;
- (v) the date on which and the country in which the company was incorporated;
- (vi) whether the company has established a place of business in British India and, if so, the address of its principal office in British India:

Provided that the provision of sub-clauses (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business;

(b) subject to the provisions of this section, state the matters specified in sub-section

(1A) of section 93 and set out the re- S. 277B.
ports specified in that section:

Provided that—

- (i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed, and
- (ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed, he proves that he was not cognisant thereof; or
- (b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of that Court,

S. 277D.

having regard to all the circumstances of the case, reasonably to be excused:

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of sub-section (1) of section 93, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

277C. (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public.

Restriction on canvassing for sale of shares.

(2) In this sub-section the expression 'house' shall not include an offence used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred.

277D. The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies (Amendment) Act, 1936, by a company incorporated outside British India which has an established place of business in British India.

Registration of charges.

Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the Company.

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-clause (i) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109A shall apply as if the property wherever situated were situated outside British India. **S. 277E.**

(2) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1938:

Provided that where the provisions of section 109 and section 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938.

277E. The provisions of sections 118 and 119 shall *mutatis mutandis* apply to the case of all companies incorporated outside British India but having an established place of business in British India and the provisions of section 130 shall apply to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India.

Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the Company.

Notice of appointment of receiver:—This section provides that in cases where a company incorporated outside

Notice of ap-
pointment of
receiver.

S. 277F. British India has an established place of business in British India the provisions of section 118 (registration of appointment of Receiver) and 119 (filing of accounts of Receiver) shall apply thereto, as well as the provisions of section 130 to the extent of requiring them to keep at their principal place in British India the books of account with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India. This Act does not require such a company to be re-incorporated in British India before commencing business in this country. Section 277 provides that within one month from the establishment of such place of business the company shall file with the registrar for registration, all documents and particulars specified in sub-section (1) and (3). Sub-section (5) of that section inserted by the amendment Act of 1936 provides that in cases where the liability of the members is limited a notice of that fact is to be stated in legible characters in every prospectus inviting subscriptions for shares, and in all bill-heads, letter-paper notices, advertisements and other publications of the company in British India.

PART XA.

BANKING COMPANIES.

277F. A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely:—

Definition of
banking com-
pany.

- (1) the borrowing, raising or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other

instruments, and securities whether **S. 277F.** transferable or negotiable or not; the granting and issuing of letters of credit, travellers cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others; the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit, or for safe custody or otherwise; the collecting and transmitting of money and securities;

- (2) acting as agents for Governments or local authorities or for any other person or persons; the carrying on of agency business of any description other than the business of a managing agent of a company not being a banking company including the power to act as attorneys and to give discharge and receipts;
- (3) contracting for public and private loans and negotiating and issuing the same;
- (4) the promoting, effecting, insuring, guaranteeing, underwriting, participating in managing, and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the

S. 277F.

- lending of money for the purpose of any such issue;
- (5) carrying on and transacting every kind of guarantee and indemnity business;
 - (6) promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new and developing or forming the same either through the instrumentality of syndicates or otherwise;
 - (7) acquisition by purchase, lease, exchange, hire or otherwise of any property immoveable or moveable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realisation of any securities held by the company or to prevent or diminish any apprehended loss or liability;
 - (8) managing, selling and realising all property moveable and immoveable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;
 - (9) acquiring and holding and generally dealing with any property and any right, title or interest in any property moveable or immoveable which may form part of the security for any loans or advance or which may be connected with any such security;
 - (10) undertaking and executing trusts;
 - (11) undertaking the administration of estates as executor, trustee or otherwise;
 - (12) taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company;

- (13) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;
- (14) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;
- (15) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;
- (16) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section;
- (17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.

277G. (1) No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word 'bank', 'banker' or 'banking'

Limitation of activities of banking company.

277J. shall be registered under this Act unless the memorandum limits the objects of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of business specified in section 277F.

(2) No banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the said Act carry on any form of business other than those specified in section 277F.

Provided that the Governor General in Council may, by notification in the Gazette of India, specify in addition to the businesses set forth in clauses (1) to (17) of section 277F other forms of business which it may be lawful under this section for a banking company to engage in.

277H. No banking company shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1936, employ or be managed by a managing agent other than a banking company for the management of the company.

Banking company not to employ managing agent.

277I. Notwithstanding anything contained in section 103, no banking company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, shall commence business, unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.

Restriction on commencement of business by banking company.

277J. No banking company shall create any charge upon any unpaid capital of the company, and any such charge shall be invalid.

Prohibition of charge on unpaid capital.

277K. (1) Every banking company shall, after the commencement of the Indian Companies (Amendment) Act, 1936, maintain a reserve fund. **S. 277L.**

(2) Every banking company shall out of the declared profits of each year and before any dividend is declared transfer a sum equivalent to not less than twenty per cent. of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

(3) A banking company shall invest the amount standing to the credit of its reserve fund in Government securities or in securities mentioned or referred to in section 20 of the Indian Trusts Act, 1882, or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section (2) of the Reserve Bank of India Act, 1934:

Provided that the provision of the sub-section shall not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, till after the expiry of two years from the commencement of the said Act.

277L. (1) Every banking company shall maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent. of the time liabilities and five per cent of the demand liabilities of such company and shall file with the registrar before the tenth day of every month three copies of a statement of the amount so held on the Friday of each week of the preceding month, with particulars of the time and demand liabilities of each such day.

(2) For the purposes of sub-section (1) 'demand liabilities' means liabilities which must be met on demand, and 'time liabilities' means liabilities which are not demand liabilities.

S. 277N. (3) Nothing in this section or in section 277K shall apply to a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(4) If default is made in complying with the requirements of section 277G, section 277H, section 277J, 277K or section 277M or with the requirements of this section as to the maintenance of a cash reserve, every director or other officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues, and if default is made in complying with the requirements of this section as to the filing of the statement referred to in sub-section (1), to a fine not exceeding one hundred rupees for every day during which the default continues.

277M. A banking company shall not form any subsidiary company except a subsidiary company of its own formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as executor trustee or otherwise and such other purposes set forth in section 277F as are incidental to the business of accepting deposits of money on current account or otherwise.

Restriction on
nature of sub-
sidiary compa-
nies.

(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company:

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936.

277N. (1) The Court may on the application of a banking company which is temporarily unable to meet

Power of Court
to stay pro-
ceedings.

its obligations make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it shall think fit and proper and may from time to time extend the period. **S. 277N**

(2) No such application shall be maintainable unless accompanied by a report of the registrar:

Provided, however, the Court may, for sufficient reasons, grant interim relief, even if the application is not accompanied by such report.

(3) The registrar shall for the purposes of his report be entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued under section 144.

Banking companies:—This chapter comprising of sections 277F to 277N are new, having been inserted by the Amendment Act of 1936 and specially relates to banking companies. Section 277F defines a banking company as meaning a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order notwithstanding that it engages in addition in any one or more of the forms of business specified in clauses (1) to (17) of that section. Section 277H provides that after the expiry of two years from the commencement of the Amendment Act of 1936 (viz., after the 15th January, 1939), no banking company shall employ or be managed by a managing agent other than a banking company for the management of the company.

Section 277I prohibits a banking company from commencing business unless shares have been allotted to an amount sufficient to yield a sum of at least Rs. 50,000 as working capital, and a declaration to that effect verified by affidavit signed by the directors and the manager has been filed with the registrar. Under section 277J it is incompetent for a

- S. 277N.** company to create any charge upon any unpaid capital of the company, and any such charge if created shall be invalid.

Section 277K is a very salutary provision and requires every banking company after the 15th of January, 1939 to create a Reserve Fund by transferring to the said fund out of the profits of every year a sum equivalent to twenty per cent. of its profits until the amount of the said fund is equal to the amount of its paid-up capital, and invest the money of the said fund in securities of the kind specified in section 20 of the Indian Trusts Act 1882, or keep it deposited in a special account opened in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act 1934. The next section requires every banking company to maintain by way of cash reserve a certain amount of money as stated in sub-section (1).

Section 277N is a further salutary provision and enables the Court on the application of a banking company which is temporarily unable to meet its obligations to make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time and on such terms and conditions as the Court may impose. The application of the company must be supported by a report of the registrar, but it is competent to the Court for sufficient reasons to grant interim relief even if the application is not accompanied by the report of the registrar.

It must be shown that the company is temporarily unable to meet its obligations. It was never the intention of the legislature in enacting section 277N that a company in an insolvent position should be allowed to continue its operations under the protection of the Court, and that those who had dealings with the company should be prevented from seeking remedies to which they would otherwise have been entitled. The Court would only undertake the responsibility of barring those legal remedies to which people ordinarily would be entitled if it was certain within reasonable limits, that they would not suffer any real loss by being deprived of those remedies^(u).

(u) The Bank of Benares, Ltd. (1939) All. 726.

PART XI.

S. 281

SUPPLEMENTAL.

Legal proceedings, offences, etc.

278. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

Cognizance of offences.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

Application of fines.

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

Power to require limited company to give security for costs.

281. (1) If in any proceeding for negligence, default, breach of duty or breach of

S. 281. Power of Court to grant relief in certain cases. trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following:—

- (a) directors of a company;
- (b) managers and managing agents of a company;
- (c) officers of a company;
- (d) persons employed by a company as auditors, whether they are or are not officers of the company.

Power of Court to grant relief in certain cases:— This section replaces the old section and empowers the Court to grant relief to directors, managers, managing agents, auditors and officers of the company from the consequences of their negligence, default, breach of duty or breach of trust where it is shown that those persons have acted honestly and rea-

sonably, and that having regard to all the circumstances of the case they ought fairly to be excused^(w). The Court has power to grant relief to directors in respect of the liability they are under for *ultra vires* acts,^(x) as well as in cases where directors are liable for penalties for having acted as directors without having obtained the necessary qualification under section 85^(y). But the section is not intended for the relief of directors in cases where they have been guilty of gross neglect of their duties extending over a period of several years^(z).

282. Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purpose of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

282A. Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.

(w) Windsor Steam Coal Co. (1929) 1 Ch. 151; National Trustees Co. of Australia V. Great Finance Co. (1905) A.C. 373.

(x) Claridge's Patent Asphalte Co. (1921) 1 Ch. 543.

(y) Barry & Staines Linoleum, Ltd. (1934) 1 Ch. 227.

(z) Govind V. Rangnath (1930) 50 Bom. 226.

S. 282B.

282B. (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the commencement of the Indian Companies (Amendment) Act, 1936, shall be invested, and shall be invested only in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the said Act which are not so invested shall be invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys.

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in their behalf to the company to see the bank's receipt for any money or security such as is referred to in sub-section (1) and sub-section (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees. **S. 286.**

283. If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

Penalty for improper use of word "Limited"

284. The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 1936, had not been passed.

Saving of pending proceedings for winding up.

285. Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

Saving of document.

286. (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

Former offices, and con-

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

S. 290.

(3) The existing registrars, assistant registrars and officers in those offices shall, during the pleasure of the local Government, hold the offices and receive the salaries hitherto held and received by them, but subject to any regulations of the Local Government with regard to the execution of their duties.

for In-
surance
Companies
Act, 1912,
and
Societies
Act, 1912.

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912.

288. In section 1 and 18 of Act No. XXI of 1860 (for the registration of Literary, Scientific and Charitable Societies), the words "registrar of joint-stock companies" in Act XXI of 1860.

289. Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

290. (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof:

Construction of
"registrar of
joint-stock com-
panies" in
Act XXI of
1860.

Act not to ap-
ply to banks of
Bengal, Madras
or Bombay.

Repeal of Acts
and Savings.

Provided that the repeal shall not affect—

- (a) the incorporation of any company registered under any enactment hereby repealed; nor
- (b) Table B in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act; nor

- (c) Table A in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act. S. 290.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

SCHEDULES.

THE FIRST SCHEDULE.

(See section 2, 17, 18, 79, 266.)

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and vice versa, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company is liable to be redeemed,

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may subject to the provisions of section 66A of the Indian Companies Act, 1913 be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class class.

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon: Provided that, in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. Except to the extent allowed by section 54A of the Indian Companies Act, 1913, no part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable, thereon.

10. The company may sell, in such manner as the director thinks fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Calls on shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time

or times of payments) pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and transmission of shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve:

I, A B of _____, in consideration of the sum of rupees _____ paid to me by C. D. of _____ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share or shares numbered _____ in the undertaking called the _____ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share or shares subject to the conditions aforesaid. As witness our hands, the _____ day of _____

Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

- (a) a fee not exceeding two rupees is paid to the company in respect thereof; and
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal.

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency.

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Forfeiture of shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the

payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

Conversion of shares into stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-

up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination.

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

33. The holders of stock shall, according to the amount of the stock had by them have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder".

Share-warrants.

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and in receiving the certificate (if any) of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or

otherwise for the payment of dividends, or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the share shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-

warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

Alteration of Capital.

41. The directors may, with the sanction of the company in general meeting, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44. The company may, by ordinary resolution,—

(a) consolidate and divide its share capital into shares of larger amount than its existing shares;

(b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of para-

graph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913;

- (c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person;

44-A. The company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held within eighteen months from the date of its incorporation and thereafter once at least in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting, being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionists, as provided by section 78 of the Indian Companies Act, 1913. If at any time these are not within British India sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

Proceedings at General Meeting.

49. Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions, fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting to such persons as are, under the Indian Companies Act, 1913, or the regulations of the company, entitled to receive such notices from the company; but the accidental omission to give notice to or the non-receipt of notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, two members in the case of a private company and five members in the case of any other company personally present shall be a quorum.

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act, 1913, and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against that resolution.

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at

which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

60. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him.

61. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may, on a poll, vote by proxy.

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

64. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

65. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation either under the common seal, or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless he is a member of the company.

66. The instrument appointing a proxy and the power-of-attorney or other authority (if any), under which it is

signed or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

Company, Limited.

"I of in the district of
being a member of the Company, Limited, hereby
appoint of as my proxy to
vote for me and on my behalf at the ordinary or extraordinary,
as the case may be general meeting of the company
to be held on the day of and at any
adjournment thereof."

Signed this day of .

Directors.

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

69. The remuneration of the directors shall from time to time be determined by the company in general meeting.

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 85 of the Indian Companies Act, 1913.

Powers and duties of Directors.

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said

Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors, and to sending it to the registrar an annual list of members, and a summary of particulars relating thereto and notice of any consolidation or increase of share capital, or conversion of shares into stock, and copies of special resolutions and a copy of the register of directors and notifications of any changes therein.

75. The director shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors;
- (b) of the names of the directors present at each meeting of the directors and of any committee of the directors;
- (c) of all resolutions and proceedings at all meetings of the company, and, of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualification of Directors.

77. The office of director shall be vacated if the director—

- (a) fails to obtain within the time specified in subsection (1) of section 85 of the Indian Companies Act, 1913, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment; or
- (b) is found to be of unsound mind by a Court of competent jurisdiction; or
- (c) is adjudged insolvent; or
- (d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or
- (e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a

managing director or manager or a legal or technical adviser or a banker; or

- (f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is longer, without leave of absence from the board of directors; or
- (g) accepts a loan from company; or
- (h) is concerned or participates in the profits of any contract with the company; or
- (i) is punished with imprisonment for a term exceeding six months:

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

Rotation of Directors.

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election.

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same

day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. Subject to the provisions of sections 83A and 83B of the Indian Companies Act, 1913 the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and

unless so fixed shall (when the number of directors exceeds three) be three.

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92. A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such

person had been duly appointed and was qualified to be a director.

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

Accounts.

103. The directors shall cause to be kept proper books of account with respect to—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place;
- (b) all sales and purchases of goods by the company;
- (c) the assets and liabilities of the company.

104. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

106. The directors shall as required by sections 131 and 131A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, income and expenditure accounts, balance sheets, and reports as are referred to in those sections.

107. The profits and loss account shall in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act, 1913, show, arranged under the most convenient heads, the amount of gross income distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in

cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, fourteen days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Audit.

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Notices.

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting.

TABLE B.

(See sections 249 and 262.)

TABLE OF FEES TO BE PAID TO THE REGISTRAR.

1.—By a company having a share capital.

	Rs.	A.	P.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40	0	0

Rs. A. P.

2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—

For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees	1 0 0
 3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration:
- Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.
4. For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.
 5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up
 6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of

II.—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20
 2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100
 3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.
 4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of
 5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable in respect of such increase, if such increase had been stated in the articles of association at the time of registration
- Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the company.
6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.

Rs. A. P.

7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the register by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up 5 0 0
8. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of 5 0 0

THE SECOND SCHEDULE.

(See sections 98 and 154.)

FORM I.

The Indian Companies Act, 1913.
STATEMENT IN LIEU OF PROSPECTUS

filed by

..... Limited,

pursuant to section 98 of the Indian Companies Act, 1913.

Presented for filing by

The nominal share capital of the company.	Rs.
Divided into	Shares of Rs. each. " " Rs. each. " " Rs. each.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs. each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of directors or proposed directors and managers or proposed managers, and any provision in the articles, or in any contracts, as to appointment of and remuneration payable to directors or managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. shares of Rs. fully paid. 2. shares upon which Rs. per share credited as paid. 3. Debenture Rs. 4. Consideration.
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company.	
Amount (in cash, shares or debentures) payable to each separate venture.	

Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.

Total purchase price	Ra..
Cash	Ra.
Shares	Ra.
Debentures	Ra.
Goodwill	Ra.

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or

Amount paid.
Amount payable.

Rate of the commission.....

Rate per cent.

The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.

Estimated amount of preliminary expenses.

Amount paid or intended to be paid to any promoter.

Name of promoter.
Amount Rs.....

Consideration for the payment.

Consideration:-

Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or affixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement).

Time and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the company (if any).

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director or consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid, to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion of formation of the company.

If it is proposed to acquire any business, the amount, as certified by the person by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect

of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on

(Signatures of the persons above-named as directors or proposed directors or of their agents authorised in writing).

Date

FORM II.

The Indian Companies Act, 1913.

STATEMENT IN LIEU OF PROSPECTUS

filed by

..... Limited,

pursuant to sub-section (1) of section 154 of the Indian Companies Act, 1913.

Presented for filing by

The nominal share capital of the Company.	Rs.
Divided into	Shares of Rs.....each. Shares of Rs.....each. Shares of Rs.....each.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs.....each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of Directors or proposed Directors and Managers or proposed Managers, and any provision in the Articles, or in any contract, as to appointment of and remuneration payable to Directors or Managers.	
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs. .fully paid. 2. Shares upon which Rs. . per share credited as paid. 3. Debenture Rs... 4. Consideration.

Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs.. Cash .. Rs.... Shares .. Rs.... Debentures .. Rs.... Goodwill .. Rs....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or Rate of the commission.	Amount paid. Amount payable. Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Unless more than two years have elapsed since the date on which the Company was entitled to commence business:—	
Estimated amount of preliminary expenses. Amount paid or intended to be paid to any promoter. Consideration for the payment	Rs. Name of promoter. Amount Rs. Consideration.
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the Company or contracts, other than contracts appointing or fixing the remuneration of a Managing Director or Managing Agent, entered into more than two years before the delivery of this statement).	
Times and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the Auditors of the Company.	
Full particulars of the nature and extent of the interest of every Director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a Director, or otherwise for services rendered by him or by the firm in connection with the promotion of the formation of the Company.	

(Signatures of the persons above named as Directors or proposed Directors or of their agents authorised in writing.)

THE THIRD SCHEDULE FORM A.

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY
SHARES.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
1. A. B. of , merchant	200
2. C. D. „	25
3. E. F. „	30
4. G. H. „	40
5. I. J. „	15
6. K. L. „	5
7. M. N. „	10
Total shares taken-	325

Dated the day of 19 .

Witness to the above signatures.

X. Y. of

FORM B.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is “The Mutual Calcutta Marine Association, Limited”.

2nd.—The registered office of the company will be situate in Calcutta.

3rd.—The objects for which the company is established are “the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object.”

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound-up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Description of Subscribers.

- "1. A. B. of
- "2. C. D. of
- "3. E. F. of
- "4. G. H. of
- "5. I. J. of
- "6. K. L. of
- "7. M. N. of

Dated the day of 19 .

Witness to the above signatures.

X. Y. of

**ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING
MEMORANDUM OF ASSOCIATION.**

Number of Members.

1. The company for the purpose of registration is declared to consist of five hundred members.

2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a

general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting: if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

Proceedings at General Meetings.

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of mem-

bers is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say):—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more,

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

Company, Limited,

I, _____, of _____, being a Member of the _____ Company, Limited, hereby appoint _____ of _____ as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the _____ day of _____ and at any adjournment thereof.

Signed this _____ day of _____

Directors.

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Elections of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

Here insert rules as to mode in which business of insurance is to be conducted.

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders", and as if "first general meeting" were substituted for "statutory meeting".

Notices.

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

- "1. A. B. of
- "2. C. D. of
- "3. E. F. of
- "4. G. H. of
- "5. I. J. of
- "6. K. L. of
- "7. M. N. of

Dated the day of

19 .

Witness to the above signatures.

X. Y. of

FORM C.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A
COMPANY LIMITED BY GUARANTEE, AND HAVING
SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is “The Snowy Range Hotel Company, Limited”.

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are “the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object.”

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in capital of the company set opposite our respective names,

Names, addresses and descriptions of Subscribers	Number of shares taken by each Subscriber.
"1. A. B. of	200
"2. C. D. of	25
"3. E. F. of	30
"4. G. H. of	40
"5. I. J. of	15
"6. K. L. of	5
"7. M. N. of	10
Total shares taken	325

Dated the day of 19 .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany preceding Memorandum of Association.

1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Tables A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of , merchant.
 "2. C. D. of
 "3. E. F. of
 "4. G. H. of
 "5. I. J. of
 "6. K. L. of
 "7. M. N. of

Dated the day of 19 .

Witness to the above signatures.

X. Y., of

FORM D.

(See sections 8 and 51.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF
AN UNLIMITED COMPANY HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of company is "The Patent Stereotype Company".

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P. Q., of Bombay, is the sole patentee."

We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital, of the company set opposite our respective names.

Names, addresses and descriptions of Subscribers	Number of shares taken by each Subscriber.
"1. A. B. of	3
"2. C. D. of	2
"3. E. F. of	1
"4. G. H. of	2
"5. I. J. of	
"6. K. L. of	
"7. M. N. of	
Total shares taken	12
Dated the	19 .. .

Witness to the above signatures.

X. Y., of

Articles of Association to accompany the preceding Memorandum of
Association.

1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.

2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

- "1. A. B. of
- "2. C. D. of
- "3. E. F. of
- "4. G. H. of
- "5. I. J. of
- "6. K. L. of
- "7. M. N. of

Dated the day of 19

Witness to the above signatures.

X. Y., of

FORM E.

AS REQUIRED BY PART II OF THE ACT.

(See section 32.)

Summary of Share Capital and Shares of the Com-
pany, Limited, made up to the day of 19
(being the day of the first ordinary general meeting in 19).

Nominal share capital Rs.	divided into *	{ shares of Rs.	each.
		{ shares of Rs.	each.
Total number of shares taken up *to the day of			
19 which number must agree with the total shown in			
the list as held by existing members.			Rs.
Number of shares issued subject to payment wholly in cash			
Number of shares issued as fully paid up otherwise than in cash			
Number of shares issued as partly paid up to the extent of			
per share otherwise than in cash			Rs.
†There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
‡Total amount of calls received, including payments on appli-			
cation and allotment			Rs.

*When there are shares of different kinds or amounts (e.g., Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately.

†Where various amounts have been called or there are shares of different kinds, state them separately.

‡Include what has been received on forfeited as well as on existing shares.

Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash	Ra.
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of .. per share	Ra.
Total amount of calls unpaid	Ra.
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary	Ra.
Total amount (if any) paid on shares forfeited	Ra.
Total amount of shares and stock for which share-warrants are outstanding	Ra.
Total amount of share-warrants issued and surrendered respectively since date of last summary	Ra.
Number of shares or amount of stock comprised in each share-warrant	Ra.
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.	1

§State the aggregate number of shares forfeited.

Names and addresses of the persons who are the Directors of the _____, Limited, on the _____ day of _____ 19 ____.

Names.	Addresses.
--------	------------

Names and addresses of the persons who are the managers of the _____, Limited, on the _____ day of _____ 19 ____.

Names.	Addresses.
--------	------------

NOTE.—Banking companies must add a list of all their places of business.

I, _____, do hereby certify that the above list and summary truly and correctly states the facts as they stood on _____ day of _____ 19 ____.

(Signature)

(State whether director, manager or secretary.)

(See section 132)

.....Limited.

Balance Sheet as at.....19

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
CAPITAL—		FIXED CAPITAL EXPENDITURE—	
Authorized Capital.....shares of Rs.....each		(Distinguishing as far as possible between expenditure upon goodwill, land, building, lease-holds, railway sidings, plant, machinery, furniture, development of property, patents, trade marks and designs, interest paid out of Capital during construction, etc., and stating every case the original cost and the additions thereto and deduction therefrom during the year, and the total depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance-sheet after the first balance-sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made).	
Issued Capital.....shares of Rs.....each		PRELIMINARY EXPENSES	
(i) Shares issued as fully paid up pursuant to any contract without payments being received in cash.....shares of Rs.....each		COMMISSION OR BROKERAGE	
(ii) Shares issued for payments in cash.....shares of Rs.....each		(Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures until written off.)	
Subscribed Capital.....shares of Rs.....each		DISCOUNT ALLOWED on the issue of shares or so much as has not been written off at the date of the balance-sheet.	
Amount called up at Rs.....per share		STORES AND SPARE PARTS	
Less—Calls unpaid—		LOOSE TOOLS	
(i) due from Managing Agents		LIVE STOCK AND VEHICLES	
(ii) due from others		STOCK IN TRADE	
Add—Forfeited shares (amount paid up).		(Stating mode of valuation, e.g., cost or market value).	
Note.—Where circumstances permit issued and subscribed capital and amount called up may be shown as one item, e.g.,		BILLS OF EXCHANGE.	
Issued and Subscribed Capital.....shares of Rs.....each, Rs.....paid up.		BOOK DEBTS	
RESERVES.			
DEBENTURES stating the nature of security			
ANY SINKING FUND			
ANY OTHER FUND CREATED OUT OF NET PROFITS, including any development fund			
ANY PENSION OR INSURANCE FUND			
PROVISION FOR BAD AND DOUBTFUL DEBTS			

CAPITAL AND LIABILITIES.

LOANS—

- (a) Secured—
 (i) loans on mortgages or fixed assets
 (ii) loans on debentures
 (iii) loans from banks, stating the nature of security
 (iv) liabilities to subsidiary companies
 (v) other secured loans, stating the nature of security
 (vi) interest accrued on mortgages, debentures or other secured loans
- (b) Unsecured—
 (i) loans from banks
 (ii) fixed deposits
 (iii) short term loans
 (iv) advances by directors or managers and managing agents
 (v) interest accruing but not due and interest accrued and due
 (vi) liabilities to subsidiary companies

UNCLAIMED DIVIDENDS

LIABILITIES—

- For Goods supplied
 For Expenses
 For Acceptances
 For Other Finance

ADVANCE PAYMENTS AND UNEXPIRED DISCOUNTS

(For the portion for which value has still to be given, e.g., in the case of the following classes of companies—
 Newspaper, Fire Insurance, Theatre, Club, Banking, Steamship Companies, etc.)

PROFIT AND LOSS

CONTINGENT LIABILITIES—

Claims against the company not acknowledged as debts
 Money for which the company is contingently liable
 (Showing separately the amount of any guarantees given by the company on behalf of directors or officers of the company.)
 Arrears of

PROPERTY AND ASSETS.

(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated.)

ADVANCES

(Recoverable in cash or in kind or for value to be received, e.g. Rates, Taxes, Insurance, etc. showing separately—
 (i) loans given to the subsidiary companies
 (ii) loans including temporary advances made at any time during the year to directors or managers of the company).

INVESTMENTS

(showing nature of investments and mode of valuation, e.g., Cost or Market value and distinguishing—
 (i) investments in Government or trust securities
 (ii) investments in shares, debentures or bonds (showing separately shares fully paid up and partly paid up),
 (iii) investments in shares, debentures or bonds of subsidiary companies
 (iv) immovable properties

INTEREST ACCRUED ON INVESTMENTS

CASH AND OTHER BALANCES

Amount in hand
 Balances with Agents and Bankers (in detail showing whether on deposit or current account, etc.)
 Profit and Loss

FORM G.

(See section 136.)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT, PROVIDENT, OR BENEFIT SOCIETIES.

- *The share capital of the company is Rs. divided into shares of Rs. each.
- The number of shares issued is Calls to the amount of Rs. per share have been made, under which the sum of Rs. has been received.
- The liabilities of the company on the thirty-first day of December (or thirtieth of June) were—
- Debts owing to sundry persons by the company;
- Under decree, Rs.
- On mortgages or bonds, Rs.
- On notes, bills or hundis, Rs.
- On other contracts, Rs.
- On estimated liabilities, Rs.
- The assets of the company on that day were:
- Government securities [stating them], Rs.
- Bill of exchange, hundis and promissory notes, Rs.
- Cash at the Bankers, Rs.
- Other securities, Rs.

FORM H.

(See section 277.)

INFORMATION TO BE SUPPLIED IN OR IN ADDITION TO THE INFORMATION CONTAINED IN THE BALANCE-SHEET OF A COMPANY REFERRED TO IN PART X.

Liabilities.

1. Summary of Authorised Share Capital and Issued Share Capital.
2. Redeemable Preference Share, stating date on or before which the shares are or are liable to be redeemed.
3. Debentures stating the nature of the Security.
4. Redeemed debentures which the Company has power to re-issue.
5. Loans (a) secured, stating the nature of the security; (b) unsecured.
6. Loans from Banks:—
 - (a) Secured, stating nature of security;
 - (b) Unsecured.
7. Profit and Loss Account, showing (unless disclosed in a separate account):—

Balance as per previous Balance-Sheet.

Appropriation thereof.

Profit since last Balance-Sheet.
8. Contingent Liabilities.
9. Arrears of Cumulative Preference Dividend.

Assets.

1. Fixed Assets, with sufficient particulars to disclose their general nature, and stating how their values are arrived at.

* If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

2. Preliminary expenses, so far as not written off.
3. Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off.
4. If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained.
5. Interest paid on Capital, so far as not written off, showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate.
6. Discount allowed on Shares issued, so far as not written off.
7. Commission paid or allowed in respect of any shares or debentures, so far as not written off.
8. Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company.
9. Particulars showing:—

(a) the amount of any loans which during the period to which the accounts relate have been made either by the Company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period;

and

(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof;

and

(c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the Company or by or from any subsidiary Company.

Note (1).—There shall not be required to be shown:—

(a) in the case of a Company the ordinary business of which includes the lending of money, loans made by the Company in the ordinary course of its business;

or

(b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees.

Note (2).—The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(Where a company is a holding company then the Balance-Sheet shall disclose the particulars required by section 132A.)

THE FOURTH SCHEDULE.

(See section 290)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
1882	VI	The Indian Companies Act, 1882.	So much as has not been repealed.
1887	VI	The Indian Companies Act (1882) Amendment Act, 1887.	The whole.
1891	XII	The Amendment Act, 1891.	So much of the Second Schedule as relates to the Indian Companies Act, 1882.
1895	XII	The Indian Companies (Memorandum of Association) Act 1895.	The whole.
	IX	The Indian Arbitration Act, 1899.	The second proviso to section 3 relating to the Indian Companies Act, 1882.
1900	IV	The Indian Companies (Branch Registers) Act, 1900.	The whole.
1910	IV	The Indian Companies (Amendment) Act, 1910.	The whole.

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